

# Journal of Food Law & Policy

---

Volume 9 | Number 1

Article 1

---

2013

## Journal of Food Law & Policy - Spring 2013

Journal Editors

Follow this and additional works at: <https://scholarworks.uark.edu/jflp>

---

### Recommended Citation

Editors, J. (2021). Journal of Food Law & Policy - Spring 2013. *Journal of Food Law & Policy*, 9(1). Retrieved from <https://scholarworks.uark.edu/jflp/vol9/iss1/1>

This Entire Issue is brought to you for free and open access by ScholarWorks@UARK. It has been accepted for inclusion in Journal of Food Law & Policy by an authorized editor of ScholarWorks@UARK. For more information, please contact [scholar@uark.edu](mailto:scholar@uark.edu).

# Journal of FOOD & LAW POLICY

Volume Nine

Number One

Spring 2013

## Articles

AN OVERVIEW OF ARKANSAS' RIGHT-TO-FARM-LAW

*L. Paul Goeringer & Dr. H.L. Goodwin*

THE FORGOTTEN HALF OF FOOD SYSTEM REFORM:  
USING FOOD AND AGRICULTURAL LAW TO FOSTER HEALTHY FOOD PRODUCTION

*Emily Broad Leib*

THE U.S. DEPARTMENT OF AGRICULTURE AS A PUBLIC HEALTH AGENCY?

A "HEALTH IN ALL POLICIES" CASE STUDY

*Lindsay F. Wiley*

UNITED STATES FOOD LAW UPDATE: SHROUDED BY ELECTION-YEAR POLITICS,  
STATE INITIATIVES AND PRIVATE LAWSUITS FILL IN THE GAPS CREATED BY

CONGRESSIONAL AND AGENCY OSSIFICATION

*A Bryan Endres, Lisa R. Schlessinger, & Rachel Armstrong*

## Comment

LOCALLY GROWN FOOD: EXAMINING THE AMBIGUITY OF  
THE TERM 'LOCAL' IN FOOD MARKETING

*Brad Rose*

---

*Journal of Food Law & Policy*  
University of Arkansas School of Law  
1045 West Maple Street  
Fayetteville, AR 72701  
Phone: 479-575-2754  
Fax: 479-575-3540  
foodlaw@uark.edu

The *Journal of Food Law & Policy* is published twice annually by the University of Arkansas School of Law in Fayetteville, Arkansas. This issue was printed at Joe Christensen, Inc., Lincoln, Nebraska 68521.

**Subscription Information:** The *Journal of Food Law & Policy* is available to subscribers for \$34.00 per year. Subscribers may mail a check and contact information to the *Journal* offices. Changes of address should be sent by mail to the address above or to foodlaw@uark.edu. The *Journal* assumes each subscriber desires to renew its subscription unless the subscriber sends notification, in writing, before the subscription expires. Back issues may be purchased from William S. Hein & Co., 1285 Main Street, Buffalo, New York 14209-1987, 1-800-828-7571.

**Citation Format:** Please cite this issue of the *Journal of Food Law & Policy* as 9 J. FOOD L. & POL'Y 1 (2012).

**Manuscripts:** The editors of the *Journal of Food Law & Policy* encourage the submission of unsolicited articles, comments, essays, and reviews on a wide variety of food-related topics. Manuscripts should be double-spaced, with text and footnotes appearing on the same page, and all submissions should include a biographical paragraph or additional information about the author(s). Manuscripts may be sent to the Editor-in-Chief by traditional post to the *Journal* offices, or by e-mail to foodlaw@uark.edu. Manuscripts sent via traditional post will not be returned.

**Disclaimer:** The *Journal of Food Law & Policy* is a student-edited University of Arkansas School of Law periodical. Publication of the *Journal* has been supported in part by the U.S. Department of Agriculture under Agreement No. 59-8201-9-115 with assistance provided through the National Center for Agricultural Law. Any opinions, findings, conclusions or recommendations expressed in the *Journal* articles are those of the individual authors and do not necessarily reflect the view of the U.S. Department of Agriculture, the National Center for Agricultural Law, or the University of Arkansas School of Law.

**Postmaster:** Please send address changes to the *Journal of Food Law & Policy*, University of Arkansas School of Law, 1045 West Maple Street, Fayetteville, AR 72701.

# Journal of Food Law & Policy

## 2012-2013 Editorial Board

BROOKE N. SOUTH  
*Editor-in-Chief*

BRAD ROSE  
*Executive Editor*

ALEXANDRA WILCOX  
*Articles Editor*

KELSEY EATON  
*Note & Comment Editor*

BROOKE JACKSON  
*Note & Comment Editor*

CORTNEY V. PRICE\*  
*Note & Comment Editor*

ELIZABETH M. COOK  
*Managing Editor*

### *Members*

BRYANT CROOKS  
ADAM T. KENT

MELANIE L. JOHNSON\*  
SONIA A. SYLLS

### *Candidates*

TIMOTHY J. ALEXANDER  
MARK B. BARRET  
STACY L. COONCE  
ANDREW D. CURTIS  
GARY DEWITT  
TYLER R. FARRAR  
CHASE HORTON  
HANNAH J. JEPPSEN  
MICHAEL MCKIRGAN  
A. CAROLINE MITCHELL  
KAYLA PHILLIPS  
DONAVON SAWYER

### *Faculty Advisory Committee*

SUSAN SCHNEIDER

\* DENOTES KAITLIN LABUDA AWARD RECIPIENT



# UNIVERSITY OF ARKANSAS

## SCHOOL OF LAW

### FACULTY AND PROFESSIONAL STAFF

---



---

#### ADMINISTRATION

---

STACY L. LEEDS, B.A., M.B.A., J.D., LL.M.,  
*Dean and Professor of Law*

CARL J. CIRCO, B.A., J.D.,  
*Associate Dean for Academic Affairs and  
Professor of Law*

TERRI CHADWICK B.A., J.D.,  
*Assistant Director of Career Services*

JAMES K. MILLER, B.S.B.A., J.D.,  
*Associate Dean for Students*

RHONDA B. ADAMS, B.S.E., M.ED.,  
*Assistant Dean and Registrar*

LYNN STEWART, B.S., B.S., C.P.A., M.B.A.,  
*Budget Director and Building Executive*

SUSAN E. SCHELL, B.A., M.A., J.D.,  
*Director of Career Planning and Placement*

PATTI COX, B.A.,  
*Director of Development & External  
Relations*

---

#### FACULTY

---

CARLTON BAILEY, B.A., J.D.,  
*Robert A. Leflar Distinguished Professor of  
Law*

LONNIE R. BEARD, B.A., J.D., LL.M.,  
*Professor of Law*

HOWARD W. BRILL, A.B., J.D., LL.M.,  
*Vincent Foster University Professor of Legal  
Ethics and Professional Responsibility*

CHAUNCEY E. BRUMMER, B.A., J.D.,  
*Professor of Law*

DUSTIN BUEHLER, B.A., J.D.,  
*Assistant Professor of Law*

CARL J. CIRCO, B.A., J.D.,  
*Associate Dean for Academic Affairs and  
Professor of Law*

ANGELA DOSS, B.A., M.A., J.D.,  
*Clinical Assistant Professor of Law*

UCHE EWELUKWA, DIP. L., LL.B., B.L.,  
LL.M., LL.M.,  
*Professor of Law*

JANET A. FLACCUS, B.A., M.A., J.D.,  
LL.M.,  
*Professor of Law*

SHARON E. FOSTER, B.A., M.A., J.D., LL.M.,  
*Associate Professor of Law*

BRIAN GALLINI, B.A., J.D., LL.M.,  
*Associate Professor of Law*

MORTON GITELMAN, J.D., LL.M.,  
*Distinguished Professor of Law Emeritus*

CAROL GOFORTH, B.A., J.D.,  
*Clayton N. Little Professor of Law*

D'LORAH HUGHES, B.A., J.D.,  
*Associate Professor of Law*

DONALD P. JUDGES, B.A., J.D., PH.D.,  
*E.J. Ball Professor of Law*

CHRISTOPHER R. KELLEY, B.A., J.D.,  
LL.M.,  
*Associate Professor of Law*

ANN M. KILLENBECK, B.A., M.A., M.ED.,  
J.D., PH.D.,  
*Associate Professor of Law*

MARK R. KILLENBECK, B.A., M.A., M.ED.,  
J.D., PH.D.,  
*Wylie H. Davis Distinguished Professor of  
Law*

KAREN KOCH, B.A., J.D.,  
*Assistant Professor of Law*

STACY L. LEEDS, B.A., M.B.A., J.D., LL.M.,  
*Dean and Professor of Law*

ERIC LEACH, B.S., J.D.,  
*Visiting Assistant Professor of Law*

ROBERT B LEFLAR, A.B., J.D., M.P.H.,  
*Ben J. Altheimer Professor of Legal  
Advocacy*

MARY ELIZABETH MATTHEWS, B.S., J.D.,  
*Sidney Parker Davis, Jr. Professor of  
Business and Commercial Law*

ROBERT B. MOBERLY, B.S., J.D.,  
*Dean Emeritus and Professor of Law*

CYNTHIA E. NANCE, B.S., M.A., J.D.,  
*Nathan G. Gordon Professor of Law*

PHILLIP E. NORVELL, B.A., J.D.,  
*Professor of Law*

LAURENT SACHAROFF, B.A., J.D.,  
*Assistant Professor of Law*

KATHRYN A. SAMPSON, B.A., J.D.,  
*Assistant Professor of Law*

SUSAN A. SCHNEIDER, B.A., J.D., LL.M.,  
*Professor of Law and Director of the LL.M.  
Program in Agricultural & Food Law*

STEPHEN M. SHEPPARD, B.A., J.D., CERT.  
INT'L L., LL.M., M. LITT., J.S.D.,  
*William H. Enfield Professor of Law and  
Associate Dean for Faculty Research and  
Development*

ANNIE B. SMITH, B.A., J.D.,  
*Assistant Professor of Law*

TIMOTHY R. TARVIN, B.A., J.D.,  
*Associate Professor of Law*

DALE WHITMAN, B.E.S., J.D.,  
*Visiting Professor of Law*

ALBERT M. WITTE, PH.B., M.A., LL.B.,  
*Professor of Law Emeritus*

ELIZABETH YOUNG, B.A., J.D.,  
*Associate Professor of Law*

---

ROBERT & VIVIAN YOUNG  
LAW LIBRARY

---

CHRIS ABEL  
*Computer Systems Administrator*

EMMY R. BULLOCK  
*Stack Maintenance Associate*

CATHERINE P. CHICK, B.A., M.L.S.,  
*Reference Librarian*

JO ANNA COLLINS  
*Circulation Manager*

JACQUELINE M. DUNN  
*Business Manager*

LORRAINE K. LORNE, B.A., J.D., M.L.S.,  
*Assistant Director and Reference/Access  
Services Coordinator*

NANCY J. PHILLIPS  
*Library Supervisor*

CHAD POLLOCK, B.A., M.Div., M.A.,  
*Electronic Services Librarian*

JASON SPRINGMAN, B.A., M.S., J.D.,  
*Instructional Services Librarian*

MONIKA SZAKASITS, B.A., J.D., M.S.L.I.S.,  
*Associate Director*

RANDALL J. THOMPSON, B.A., J.D., M.L.S.,  
*Director*

ROBERT E. WHEELER  
*Audio Visual Aids Supervisor*

COLLEEN WILLIAMS, B.A., J.D., M.L.I.S.,  
*Reference Librarian*

ADAM ZORZIN  
*Computer Support Specialist*

*The University of Arkansas School of Law is a member of the Association of American Law  
Schools and is accredited by the American Bar Association.*



## AN OVERVIEW OF ARKANSAS' RIGHT-TO-FARM LAW

*L. Paul Goeringer\* & Dr. H.L. Goodwin\*\**

I. INTRODUCTION.....	1
II. DISCUSSION.....	2
A. <i>Right-to-Farm Laws Generally</i> .....	2
B. <i>Arkansas's Right-to-Farm Law</i> .....	3
1. What is an "Agricultural Operation".....	3
2. Types of Defenses Available.....	5
i. Using Practices Commonly Associated with Agriculture.....	5
ii. The "Coming to the Nuisance" Defense.....	6
iii. One-year Limitations Period.....	7
3. Attorneys Fee Provision.....	9
4. Exclusions to the Law.....	10
5. Law's Affect on County and Local Ordinances.....	11
C. <i>Constitutionality of the Right-to-Farm Law</i> .....	13
III. CONCLUSION.....	16

### I. INTRODUCTION

In the 1980s, state legislatures in all fifty states enacted statutes commonly referred to as "right-to-farm" laws.<sup>1</sup> Arkansas enacted its right-to-farm law ("the Act") in 1981.<sup>2</sup> While there are similarities, these laws differ from state-to-state.<sup>3</sup> All right-to-farm laws provide agricultural producers with statutory defenses to nuisance challenges, subject to certain

---

\* Goeringer is a Research Associate with the Center for Agricultural and Natural Resources Policy, Department of Agricultural and Natural Resources Economics, College of Agriculture and Natural Resources, University of Maryland. Mr. Goeringer is licensed to practice law in Oklahoma.

\*\*Goodwin is a Professor, Department of Agricultural Economics and Agribusiness, Dale Bumpers College of Agricultural, Food & Life Sciences at the University of Arkansas.

1. See Adam Van Buskirk, *Right-to-Farm Laws as "Takings" in Light of Bormann v. Board of Supervisors and Moon v. North Idaho Farmers Association*, 11 ALB. L. ENVTL. OUTLOOK J. 169, 170 \*\*2006). For a survey of all fifty states right-to-farm laws, see Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99 \*1988).

2. Hamilton & Bolte, *supra* note 1, at 104.

3. See generally Hamilton & Bolte, *supra* note 1.

conditions.<sup>4</sup> As one scholar has noted, right-to-farm laws are designed “to protect existing farm investments by reducing actions under nuisance law that enjoined agricultural activities.”<sup>5</sup> These laws also work to preserve farmland and protect established farmland from the pressures of urbanization, allowing “farmers to continue with their husbandry pursuits rather than enjoining them from farming due to the presence of a nuisance.”<sup>6</sup>

Legal scholars have written much about right-to-farm laws.<sup>7</sup> This article will not attempt to recover areas already covered by those authors. Instead, this article will discuss the statutory protections offered by the Act to an agricultural producer. Section II.A will deal with general background on right-to-farm laws. Section II.B of the article will focus on the Act’s specific provisions. This section will encompass who is protected, what agricultural operations are protected, the exemptions the Act contains, and the affect of the Act on local and county ordinances in Arkansas. Section II.C covers constitutional takings that might arise out of the Act.

## II. DISCUSSION

### A. *Right-to-Farm Laws Generally*

Right-to-farm laws typically can take two approaches: 1) codifying the “coming to the nuisance” defense.<sup>8</sup> According to one source, “the fact

4. See Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. R. 87, 87-88 (2006), available at [http://www.nationalaglawcenter.org/assets/articles/centner\\_righttofarm.pdf](http://www.nationalaglawcenter.org/assets/articles/centner_righttofarm.pdf).

5. *Id.*

6. *Id.* at 88.

7. See Keith Burgess-Jackson, *The Ethics and Economics of Right-to-Farm Statutes*, 9 HARV. J. L. & PUB. POL’Y 481 (1986) (reviewing the economic efficiency of right-to-farm statutes); Tiffany Dowell, *Daddy Won’t Sell the Farm: Drafting Right to Farm Statutes to Protect Small Family Producers*, 18 SAN JOAQUIN AGRIC. L. REV. 127 (2008-09) (looking at important provisions in the laws); Jeffry R. Gittins, *Bormann Revisited: Using the Penn Central Test to Determine the Constitutionality of Right-to-Farm Statutes*, 2006 BYU L. REV. 1381 (2006) (looking at the constitutionality of the laws); Jennifer L. Beidel, *Pennsylvania’s Right-to-Farm Law: A Relief for Farmers or an Unconstitutional Taking?*, 110 PENN STAT. L. REV. 163 (2005) (looking at Pennsylvania’s right-to-farm law); Steven J. Laurent, *Michigan’s Right to Farm Act: Have Revisions Gone Too Far?*, 2002 L. REV. MICH. ST. U. DET. C.L. 213 (2002) (reviewing Michigan’s right-to-farm law); Jesse J. Richardson, Jr. & Theodore A. Feitshans, *Nuisance Revisited After Buchanan and Bormann*, 5 DRAKE J. AGRIC. L. 121 (2000) (looking at the takings issue), available at [http://nationalaglawcenter.org/assets/bibarticles/richardsonfeitshans\\_nuisance.pdf](http://nationalaglawcenter.org/assets/bibarticles/richardsonfeitshans_nuisance.pdf).

8. Centner, *supra* note 4, at 95.

that the complainant 'came to the nuisance' constitutes a defense or operates as an estoppel[;]"<sup>9</sup> and 2) limiting the statutory period in which nuisance suits can be brought, such as requiring nuisance suits to be brought within one-year of the establishment of the agricultural operation.<sup>10</sup> With this defense, the right-to-farm law will provide a period of time from the establishment of the operation when a nuisance suit must be brought. The Act takes both of these approaches, as well as adding other statutory protections and exemptions.<sup>11</sup>

### B. *Arkansas's Right-to-Farm Law*

The stated purpose of the Act is "to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance."<sup>12</sup> To limit the circumstances under which agricultural operations can be deemed a nuisance, the legislature created provisions to help protect Arkansas agricultural operations from the encroachment of nonagricultural land uses.

#### 1. What is an "Agricultural Operation"

The Arkansas legislature clearly intended the Act to protect Arkansas's agricultural operations, and in so doing, broadly defined what is considered an "agricultural operation."<sup>13</sup> An "agricultural operation" is defined as follows:

an agricultural, silvicultural, or aquacultural facility or pursuit conducted, in whole or in part, including:

(A) The care and production of livestock and livestock products, poultry and poultry products, apiary products, and plant and animal production for nonfood uses;

(B) The planting, cultivating, harvesting, and processing of crops and timber; and

(C) The production of any plant or animal species in a controlled freshwater or saltwater environment[.]<sup>14</sup>

---

9. 58 Am. Jur. 2d *Nuisances* § 373 (2009).

10. Centner, *supra* note 4, at 95.

11. Arkansas's right-to-farm statute is codified at sections 2-4-101 through 2-4-108 of the Arkansas Code.

12. ARK. CODE ANN. § 2-4-101 (West 2009).

13. *See Id.*

14. *Id.* § 2-4-102. "Apiary products" would be honey.

The breadth of this statutory definition has never been fully explored by an Arkansas court. It would be a safe assumption that agricultural producers involved in traditional agricultural operations, such as livestock and row crops, would be protected under the Act. Newer, more non-traditional “agricultural operations” may be determined by an Arkansas court on a case-by-case basis.

Other states’ courts have recognized non-traditional “agricultural operations” as covered by their states’ right-to-farm laws. For example, a Michigan court found that a pheasant hunting preserve qualified as a “farming operation” under Michigan’s right-to-farm law.<sup>15</sup> In this case, the court examined the definitions of “farm product” and “farm operations.”<sup>16</sup> The court determined that game birds constituted “‘farm products’ because the[y] are useful to human beings and produced by agriculture.”<sup>17</sup> The court also determined that the “hunting of game birds on defendant’s property constitutes a ‘farm operation’ because it involves the ‘harvesting of farm products.’”<sup>18</sup> The operation qualified as a “farm operation,” and because other relevant statutory conditions were satisfied, the court afforded the defendants the protections of the right-to-farm law.<sup>19</sup>

On the other hand, a Texas court found that the raising of fighting chickens did not qualify as an “agricultural operation” under Texas’s right-to-farm law.<sup>20</sup> In *Hendrickson*, the court looked at the legislative intent in passing Texas’ right-to-farm law.<sup>21</sup> The court found the legislative intent was to protect those agricultural producers “who engaged in activities that produce food[,]” and the raising of fighting chickens did not qualify as the

---

15. *Milan Twp. v. Jaworski*, No. 240444, 2003 WL 22872141, at \*4 (Mich. Ct. App. Dec. 4, 2003), *appeal denied*, 683 N.W.2d 146 (Mich. 2004). Note that Arkansas’s law includes “farming operation” within “agricultural operation.” See § 2-4-102(1).

16. *Milan Twp.*, 2003 WL 22872141, at \*4. Michigan defines a “farm operation” as “the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products[.]” *Id.* (quoting MICH. COMP. LAWS ANN. § 286.472(b) (West 2009)). A “farm product” is defined as:

those plants and animals useful to human beings produced by agriculture and includes, but is not limited to, forages and sod crops, grains and feed crops, field crops, dairy and dairy products, poultry and poultry products . . . or any other product which incorporates the use of food, feed, fiber, or fur, as determined by the Michigan commission of agriculture.

*Id.* (quoting MICH. COMP. LAWS ANN. § 286.472(c) (West 2009)).

17. *Milan Twp.*, 2003 WL 22872141, at \*4.

18. *Id.*

19. *Id.*

20. *Hendrickson v. Swyers*, 9 S.W.3d 298 (Tex. App. 1999).

21. *Id.* at 300.

production of food.<sup>22</sup> These are just some examples of non-traditional agricultural operations found to either fall under the protections of a state's right-to-farm law or outside the protections.<sup>23</sup>

## 2. Types of Defenses Available

Under Arkansas's law, an agricultural operation cannot be enjoined from operating due to a nuisance as long as certain statutory conditions are met. The law provides three different statutory conditions that an agricultural producer may fall under for the protections of the law.<sup>24</sup> The three different statutory conditions include a one-year statute of repose, employing methods commonly associated with agricultural production, and establishing the operation before the complaining activities came.<sup>25</sup> An agricultural producer only needs to qualify under one of the three defenses provided.<sup>26</sup>

### i. Using Practices Commonly Associated With Agriculture

Section 1-4-107(b)(1) provides that "[e]xcept as provided in this section, an agricultural operation shall not be found to be a public or private nuisance if the agricultural operation alleged to be a nuisance employs methods or practices that are commonly or reasonably associated with agricultural production."<sup>27</sup> If the agricultural producer is using those "methods or practices that are commonly or reasonably associated with agricultural production,"<sup>28</sup> then their operation will have "a rebuttable presumption that an agricultural operation is not a nuisance."<sup>29</sup> Neither the statute nor the Arkansas courts have defined "methods or practices that are commonly or reasonably associated with agricultural production."<sup>30</sup>

In other states, using accepted agricultural practices is seen as a way to "encourage abstinence from poor husbandry practices that might

---

22. *Id.*

23. For more examples of activities found to be "agricultural operations" under other states' right-to-farm laws, see Harrison M. Pittman, *Validity, Construction, and Application of Right-to-Farm Acts*, 8 A.L.R.6th 465 (2005).

24. See ARK. CODE ANN. § 2-4-107 (West 2009).

25. See *id.*

26. Each agricultural producer's situation will be different, and effectively planning to defend against possible litigation may require the producer to consult with a licensed attorney to help determine the proper defense the operation would qualify for.

27. ARK. CODE ANN. § 2-4-107(b)(1) (West 2009).

28. *Id.*

29. *Id.* § 2-4-107(c)(2).

30. *Id.*



constitute a nuisance.”<sup>31</sup> The typical problem with limiting right-to-farm statutes to accepted agricultural practices is that a judicial determination must be made regarding whether the agricultural practice is entitled to the statutory right-to-farm defense.<sup>32</sup> A federal district court was unwilling to extend Washington’s right-to-farm law to protect a defendant who had “not engaged in ‘good forestry practices’ as demonstrated by the fact that it violated several water quality laws.”<sup>33</sup> In order to qualify for the statutory defense, an Arkansas agricultural producer must abstain from poor agricultural practices and avoid violating other state or federal laws.

If an agricultural operation is following those accepted agricultural practices, it will not be found to be a public or private nuisance because of limited activities or conditions such as: “(A) Change in ownership or size; (B) Nonpermanent cessation or interruption of farming; (C) Participation in any government-sponsored agricultural program; (D) Employment of new technology; or (E) Change in the type of agricultural product produced.”<sup>34</sup> Any change in ownership, temporary halt in farming operations, an interruption in farming, participation in any type of government agricultural program,<sup>35</sup> adoption of new technology, or change in crops or livestock raised will still allow a producer to claim the law’s statutory defense of following accepted agricultural practices.

## ii. The “Coming to the Nuisance” Defense

The next statutory defense the law provides is a codification of the “coming to the nuisance” defense. Section 2-4-107(c)(1)(A) provides that an agricultural operation will not become a public or private nuisance if it “[w]as established prior to the commencement of the use of the area surrounding the agricultural operation for nonagricultural activities[.]”<sup>36</sup> In order to qualify for this statutory defense, the agricultural operation must also use be using reasonable or commonly used agricultural practices.<sup>37</sup>

---

31. Centner, *supra* note 4, at 107.

32. *See id.* at 109.

33. Gill v. LDI, 19 F. Supp. 2d 1188, 1200 (W.D. Wash. 1998).

34. ARK. CODE ANN. §§ 2-4-107(b)(2)(A)-(E) (West 2009).

35. Examples of these programs include the Conservation Reserve Program, the Conservation Security Program, and the Environmental Quality Incentives Program, which would not eliminate the protections the law provides by following accepted agricultural practices. CRS Report for Congress, Agricultural Conservation: A Guide to Programs, Sept. 8, 2010, available at <http://crs.ncseonline.org/nle/crsreports/10Oct/R40763.pdf>.

36. ARK. CODE ANN. § 2-4-107(c)(1)(A) (West 2009).

37. *Id.* § 2-4-107(c)(1)(B).

The coming to the nuisance defense is limited to nuisance claims by future neighbors.<sup>38</sup> The Supreme Court of Georgia found that statutory coming to the nuisance defense did not apply when the plaintiff's use of property had existed prior to the defendant's use.<sup>39</sup> This is an exception to the coming to the nuisance defense that agricultural producers rarely consider. In order to qualify for the statutory defense, an agricultural producer's use must be established before other neighboring landowners' uses are established.

### iii. One-year Limitations Period

The final defense in the law provides agricultural producers with a limited period in which nuisance suits can be brought. The law provides that:

An agricultural operation or its facilities or appurtenances shall not be or become a public or private nuisance as a result of any changed conditions in and about the locality after it has been in operation for a period of one (1) year or more when the agricultural operation or its facilities or appurtenances were not a nuisance at the time the agricultural operation began.<sup>40</sup>

This provision means that a neighboring landowner who does not file a nuisance action within one year of "the commencement of the offensive activity may not successfully maintain the nuisance lawsuit."<sup>41</sup> After one year, unless the agricultural operation was a nuisance when it started, the agricultural producer is exempt from nuisance suits brought by neighboring landowners in the future. Decisions of states interpreting similar provisions can also provide some guidance for an Arkansas court. These decisions provide an Arkansas court with two differing interpretations. With the first view, the Texas Supreme Court has found a provision similar to Arkansas's to be a statute of repose.<sup>42</sup> According to the Texas court, "the relevant

---

38. See Centner, *supra* note 4, at 96-97.

39. *Herrin v. Opatut*, 281 S.E.2d 575, 578-79 (Ga. 1981) (finding plaintiffs' nonagricultural uses of their land were established before defendants built their egg farm). See also *Cline v. Franklin Pork, Inc.*, 361 N.W.2d 566, 572 (Neb. 1985) (finding defendants' hog farm was established after the plaintiffs had moved on their property and statutory defense did not apply); *Flansburgh v. Coffey*, 370 N.W.2d 127 (Neb. 1985) (holding plaintiffs' residential use of their property was established prior to defendants' establishment of a hog farm on their property and statutory defense did not apply).

40. ARK. CODE ANN. § 2-4-107(a) (West 2009).

41. Centner, *supra* note 4, at 98.

42. *Holubec v. Brandenberger*, 111 S.W.3d 32 (Tex. 2003). A "statute of repose" is defined as "[a] statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period

inquiry is whether the conditions or circumstances constituting the basis for the nuisance action have existed for more than a year.”<sup>43</sup> This view is followed by many states.<sup>44</sup>

The competing view has only been adopted by Minnesota. The Court of Appeals of Minnesota, when reviewing a similar provision in Minnesota’s right-to-farm law, looked to the plain meaning of the section.<sup>45</sup> The court found that when “considering the timeliness of a nuisance claim against a facility that has been in operation for more than two years [a court] must determine whether . . . the operation was a nuisance when [it was] established.”<sup>46</sup> Simply put, if the agricultural operation was a nuisance at the time the operation was established, the law would not protect the operation.

Starting in 1984, the Arkansas attorney general has issued two opinions on this provision of the law. Although not binding on a state court, the opinions provide persuasive authority on how to interpret this provision. In answering a question posed by the Department of Health on the department’s authority to promulgate regulations pertaining to general sanitation, the attorney general found the one-year limitations provision would not allow enforcement of those rules against facilities in operation for more than one year.<sup>47</sup>

The attorney general appears to have adopted the Minnesota view.<sup>48</sup> When evaluating the provision, the attorney general considered the General Assembly’s emergency clause, which stated:

that to permit any such facility which was not a nuisance when established to be declared a nuisance and forced to cease operations because of change in conditions in the

---

ends before the plaintiff has suffered a resulting injury.” *Black’s Law Dictionary* 1451 (8th ed. 2004).

43. *Holubec*, 111 S.W.3d at 38.

44. See generally *Lindsey v. DeGroot*, 898 N.E.2d 1251 (Ind. Ct. App. 2009) (finding Indiana’s right-to-farm law barred claims if the operation had continually operated for more than one year); *Horne v. Haladay*, 728 A.2d 954 (Pa. Super. Ct. 1999) (finding the defendant’s poultry house had been in operation in a substantially unchanged manner for more than one year prior to the plaintiff’s filing the nuisance suit); *Aguilar v. Trujillo*, 162 S.W.3d 839, 853-54 (Tex. App. 2005) (finding it irrelevant when the plaintiffs discovered the circumstances constituting the nuisance action if more than one year had passed); *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544 (Tex. App. 2004) (finding nuisance claims for dust caused by cattle barred because it had been in existence for more than one year).

45. *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 553 (Minn. Ct. App. 2003).

46. *Id.*

47. Ark. Op. Att’y Gen. No. 86-199 (1986), 1986 WL 83826.

48. See Ark. Op. Att’y Gen. No. 84-94 (1984), 1984 WL 63274, at \*3-4.

locality and after the facility has been in operation for a long period of time is not only unfair to the owners, operators and employees of such plant but is highly detrimental to the economic growth and development of the State. . .<sup>49</sup>

The attorney general found this to mean that:

the spraying operation, if it be a nuisance, has been such since its inception. Furthermore, this is not the case of an acceptable operation becoming(sic) a nuisance as a result of changed conditions in the area occurring after the spraying had been in operation for a long period of time. Therefore, Act 301 of 1981 should pose no barrier to a private suit.<sup>50</sup>

An Arkansas court interpreting this one-year limitation provision could choose from two alternatives. The Arkansas court could follow the majority view to bar all nuisance suits against an agricultural operation after the operation has been established for more than one year. The other view is to look back to the establishment of the operation to determine if the operation was a nuisance, and if so, allow nuisance suits against the operation.

Again, it should be noted that each available defense described is one of three possible choices that an Arkansas producer will have in defense of a potential nuisance suit, and each defense is independent of the other. A producer would want to consult with a licensed attorney to determine the best defense for their operation.

### 3. Attorneys Fee Provision

Regardless of which view an Arkansas court adopts, an Arkansas producer that successfully defends a nuisance suit brought by a neighboring landowner may not be forced to pay the substantial legal bills that may mount during the litigation process. This fee provision is not universal to all states' right-to-farm laws, and Arkansas is unique for having such a provision.<sup>51</sup> Section 2-4-107(d) provides that the court may award

---

49. *Id.* at 3.

50. *Id.* at 4.

51. For a list of states' right-to-farm statutes with attorney's fee provisions, see Neil D. Hamilton, *A Livestock Producer's Legal Guide To: Nuisance, Land Use Control, and Environmental Law* 166-69 (Drake Univ. Agric. Law Ctr. 1992).

litigation expenses to the prevailing party.<sup>52</sup> The litigation expenses provided for in the Act would allow, in the court's discretion, the prevailing party to collect "expert fees, reasonable court costs, and reasonable attorney's fees[.]"<sup>53</sup> This provision helps to provide the producer with some extra protection and provide for their litigation expenses for successfully defending against a nuisance suit barred by the Act.

#### 4. Exclusions to the Law

The Act contains two exclusions when the right-to-farm defense or defenses would not be available to an agricultural producer. Neither of the two exclusions has been tested in an Arkansas court. With the first exclusion, the Act will not provide a defense for the pollution of or change in condition to the waters of a stream.<sup>54</sup> This exclusion provides that:

[t]he provisions of this chapter shall not affect or defeat the right of any person, firm, or corporation to recover damages for any injuries or damages sustained by them on account of any pollution of or change in the condition of the waters of any stream or on account of any overflow of the lands of any person, firm, or corporation.<sup>55</sup>

From a plain reading of the provision, an agricultural producer could expect to lose the statutory defenses of the Act whenever their operations are found to have caused pollution of a stream, a change in condition of a stream, or cause water to overflow on a neighbor's land. An example of this could occur when a rice producer floods a rice field. If any water overflowed and caused damages to a neighboring landowner, the rice producer would lose the defenses the Act provides from the damages caused by the overflowing water. The same is true for any stream water pollution or change in the condition of a stream caused by an agricultural operation. Agricultural producers causing this type of damage also lose the defenses provided by the Act.

The second exclusion does not exempt agricultural producers from statutory obligations under federal or other state laws, such as federal and

---

52. ARK. CODE ANN. § 2-4-107(d) (West 2009). This section provides "[t]he court may award expert fees, reasonable court costs, and reasonable attorney's fees to the prevailing party in any action brought to assert that an agricultural operation is a public or private nuisance." *Id.*

53. *Id.*

54. *See Id.* § 2-4-106.

55. *Id.*

state environmental laws.<sup>56</sup> The Act does not preempt federal environmental laws because of the Supremacy Clause of the U.S. Constitution.<sup>57</sup> An agricultural producer still needs to meet statutory duties under federal laws.<sup>58</sup> An example given by Grossman and Fischer is the permit requirements for certain concentrated animal feeding operations under the Federal Water Pollution Control Act.<sup>59</sup> According to Grossman and Fischer, the right-to-farm law may give protection for the nuisance caused by the violation of the permit, but does not shield the agricultural producer from EPA enforcement for the permit violation.<sup>60</sup>

The Act does not provide protection against liability incurred because of a violation of a state environmental law. The Act, as Grossman and Fischer point out, expresses “no intention in the language of those statutes to repeal environmental laws applicable to farming operations.”<sup>61</sup> This allows for both laws to “be interpreted consistently if right to farm laws are construed not to affect the application of the environmental laws.”<sup>62</sup>

In summary, in order to qualify for the statutory defenses of the Act, agricultural producers must make sure that their agricultural operation is not violating either of the two exclusions. The statutory defenses will be lost if the agricultural producer causes pollution of a stream, a change in condition of a stream, or water to overflow on a neighbor’s land. Finally, the Act will only provide statutory defenses for nuisance actions, and not give general statutory defenses to all applicable federal and state laws.

## 5. Law’s Affect on County and Local Ordinances

The Act limits the affect of local ordinances on agricultural operations. The Act invalidates all municipal and county ordinances that attempt to make agricultural operations nuisances. Section 2-4-105 reads:

---

56. For a detailed discussion on this issue, see Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 150-57 (1983).

57. *Id.* at 150-51. The Supremacy Clause of the U.S. Constitution states that the U.S. “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land[.]” U.S. CONST. art. VI, § 2.

58. Grossman & Fischer, *supra* note 56, at 150.

59. *Id.* at 151-52.

60. *Id.* In fact under Arkansas law, compliance with such a permit would “create a rebuttable presumption that an agricultural operation is not a nuisance.” ARK. CODE ANN. 2-4-107(c)(2) (West 2009).

61. Grossman & Fischer, *supra* note 56, at 153.

62. *Id.*

Any and all ordinances adopted by any municipality or county in which an agricultural operation is located making or having the effect of making the agricultural operation or any agricultural facility or its appurtenances a nuisance or providing for an abatement of the agricultural operation or the agricultural facility or its appurtenances as a nuisance in the circumstances set forth in this chapter are void and shall have no force or effect.<sup>63</sup>

But with few counties having set up county zoning boards, the extent of the Act only currently applies to a limited number of counties in the state.<sup>64</sup> In these counties, this section would void all county or local ordinances that have the effect of making an agricultural operation a nuisance.

The Arkansas attorney general has issued a few opinions dealing with this section of the Act. Although the opinions are not binding on an Arkansas court, they provide persuasive authority to the courts. Using this section, the attorney general has found that a city would have no jurisdiction to adopt ordinances regulating livestock auction barns.<sup>65</sup>

In dealing with city ordinances prohibiting swine and poultry operations in certain areas of the Town of Oak Grove, the attorney general found that this provision would limit the city's power.<sup>66</sup> The attorney general found that this provision would invalidate any ordinance that tried to regulate those agricultural operations "in existence for at least one year prior to the ordinance's adoption."<sup>67</sup>

Finally, in dealing with a county having the authority to exclude a hog farm from certain areas, the attorney general also found this provision would limit the county's powers.<sup>68</sup> The attorney general found that the hog farm ordinance would be valid if it was a reasonable restraint on "property owners so as not to cause injury to the property rights of their neighbors."<sup>69</sup>

---

63. ARK. CODE ANN. § 2-4-105 (West 2009).

64. For example, Washington County currently has ordinances in place to protect agriculture and allow for the zoning of agriculture. See PARA Task Force Recommendation for Establishing Various Zones and Implementing Zoning in Washington County, Arkansas, <http://www.co.washington.ar.us/PARA/PARA-SummaryRecommendation120805.htm> (last visited Nov. 19, 2012). This is just one example of the type of zoning regulations that could exist for agriculture.

65. Ark. Op. Att'y Gen. No. 83-194 (1983), 1983 WL 52188.

66. Ark. Op. Att'y Gen. No. 87-120 (1987), 1987 WL 124416.

67. *Id.*

68. Ark. Op. Att'y Gen. No. 87-297 (1988), 1988 WL 279362.

69. *Id.*

On the other hand, the ordinance that interfered with an existing agricultural facility is void because of the local ordinance provision.<sup>70</sup>

Other states have a similar provision in their right-to-farm laws, and have dealt with the extent of the limits of the right-to-farm preemption of local and county ordinances.<sup>71</sup> The Alaska Supreme Court found that their ordinance preemption provision did not preempt the enforcement of a permit revocation requiring the agricultural producer to remove a fence.<sup>72</sup> The Connecticut Court of Appeals found their state's preemption provision did not bar a local ordinance requiring a horse farm to submit a nutrient management plan.<sup>73</sup> The Supreme Court of Rhode Island held their right-to-farm statute preempted a local ordinance, in which the municipality was asserting that the agricultural operation had violated a local ordinance with dust that came from pond excavation activities, and the court found the right-to-farm law protected this activity.<sup>74</sup>

Agricultural producers in Arkansas have protection from municipal and county ordinances directed at making their operations nuisances in areas. However, many producers are starting to feel the pressures of urbanization and urban sprawl. This provision will preempt nuisance ordinances that could be used to drive preexisting agricultural operations out of the area, which is another protection the Act offers agricultural producers in the state.

### C. *Constitutionality of the Right-to-Farm law*

The final area of concern is the constitutionality of the Act.<sup>75</sup> The majority of states have upheld the constitutionality of their right-to-farm

---

70. *Id.*

71. To view a thorough but not necessarily exhaustive compilation of similar state provisions preempting local and county ordinances, see the National Agricultural Law Center's Case Law Index for Urbanization and Agriculture decisions from January 1, 2002 to current, available at <http://www.nationalaglawcenter.org/assets/caseindexes/urbanencroachment.html>. For more cases, see Pittman, *supra* note 23.

72. *Gates v. City of Tenakee Springs*, 822 P.2d 455, 463 (Alaska 1991) (finding "that statute is designed to provide a defense against a nuisance action, not against a permit revocation under city ordinances.").

73. *Ammirata v. Zoning Bd. of Appeals of Town of Redding*, 782 A.2d 1285, 1292 (Conn. App. Ct. 2001), *rev'd on other grounds*, 826 A.2d 170 (Conn. 2003) (finding that the preemption law is limited to nuisance ordinances and the farm had not been declared a nuisance).

74. *Town of N. Kingstown v. Albert*, 767 A.2d 659 (R.I. 2001). Again, these are just examples and will only be persuasive to Arkansas courts deciding this issue. For more examples of decisions on this issue, see Pittman, *supra* note 23.

75. For a review of federal takings law, see Jason Jordon, *A Pig in the Parlor or Food on the Table: Is Texas's Right to Farm Act an Unconstitutional Mechanism to*



laws when challenged. Like many other issues involving the state's right-to-farm law, an Arkansas court has yet to rule on the constitutionality of the Act. Finding the Act unconstitutional would result in a loss of all the statutory defenses the Act provides.

The Supreme Court of Iowa has twice found provisions of their right-to-farm law to be unconstitutional.<sup>76</sup> In *Bormann v. Board of Supervisors*, the Supreme Court of Iowa found that a provision of the state's right-to-farm law was unconstitutional.<sup>77</sup> The court found that the immunity from nuisance suits, in Iowa Code section 352.11(1)(a), "resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants [defendants]. The easements entitle the applicants [defendants] to do acts on their property, which . . . would constitute a nuisance."<sup>78</sup> This creation of an easement was found to be an unconstitutional taking and the court invalidated this provision.<sup>79</sup>

In *Gacke v. Pork Xtra, L.L.C.*, the Supreme Court of Iowa found the section to be indistinguishable from the one at issue in *Bormann*.<sup>80</sup> Section 657.11(2) gave animal feeding operations a statutory defense against nuisance claims brought by neighboring landowners.<sup>81</sup> Relying on its earlier decision in *Bormann*, the court invalidated the section as an unconstitutional taking.<sup>82</sup>

When faced with the issue of the constitutionality of right-to-farm laws, the majority of states have reached the opposite conclusion of the Iowa courts. A Texas Court of Appeals rejected arguments that Texas's

---

*Perpetuate Nuisances or Sound Public Policy Ensuring Sustainable Growth?*, 42 TEX. TECH L. REV. 943 (2010). This article also provides the reader with a good overview of the different types of nuisances.

76. *Bormann v. Board of Supervisors In & For Kossuth County*, 584 N.W.2d 309 (Iowa 1998); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004) (a summary of the *Gacke* decision written by Jennifer Williams and provided by the National Agricultural Law Center is available at <http://www.nationalaglawcenter.org/assets/cases/gacke.html>).

77. *Bormann*, 584 N.W.2d at 322.

78. *Id.* at 321.

79. *Id.* at 321-22.

80. *Gacke*, 684 N.W.2d at 173.

81. *Id.* at 171.

82. *Id.* at 175. For more detailed discussions on these two cases, see Centner, *supra* note 5, at 117-41; Pittman, *supra* note 23, at sections 4-5, 7-8; Buskirk, *supra* note 1; Jeffery R. Gittins, *Bormann Revisited: Using the Penn Central Test to Determine the Constitutionality of Right-to-Farm Statutes*, 2006 BYU L. REV. 1381 (2006); Lynda J. Oswald, *At the Intersection of Environmental Law and Nuisance Law: Do Right-to-Farm Statutes Result in Regulatory Takings?*, 30 REAL EST. L. J. 69 (2001) (a copy of these articles are available upon request from the author).

right-to-farm statute is unconstitutional.<sup>83</sup> The Supreme Court of Idaho rejected an argument to apply the Iowa Supreme Court's reasoning to their right-to-farm law.<sup>84</sup> The Indiana Court of Appeals also rejected an argument to apply Iowa's ruling to Indiana's right-to-farm statute.<sup>85</sup>

Arkansas has no case law finding the right to maintain a nuisance creates an easement. The Idaho and Indiana courts cited a lack of similar case law as the reason to reject the reasoning of the Iowa Supreme Court. Lacking similar case law, an Arkansas court would probably reject arguments that the Act is unconstitutional.

This rejection would also be in line with the views of other legal scholars. The coming to the nuisance defense, codified in section 2-4-107(c)(1)(A), would be "a permissible extension of state law."<sup>86</sup> "Legislatures can establish rules whereby persons who move next to a nuisance are estopped from maintaining an action to abate the existing nuisance."<sup>87</sup>

The one-year limitations period, in section 2-4-107(a), would also prevent the Act from being found unconstitutional. Professor Terrence Centner has pointed out that similar limitation periods have withstood judicial scrutiny.<sup>88</sup> "Because statutes of limitation provide a window of opportunity for bringing nuisance actions, there is no unconstitutional deprivation of property rights."<sup>89</sup> Neighboring landowners would have one year in which to bring a nuisance claim, and not totally have that right taken away.

Arkansas case law does not include the same case law that Iowa has used to find its right-to-farm law unconstitutional. In comparing the defenses to those noted by other legal scholars, the Act's defenses are likely constitutional. But without specific facts and circumstances of such a case, the Act would appear to be constitutional in most applications.

---

83. *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544 (Tex. App. 2004) (a summary of this opinion written by Ross Pifer is available at <http://www.nationalaglawcenter.org/assets/cases/barrera.html>).

84. *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637 (Idaho 2004) (a summary of this opinion written by Ross Pifer is available at <http://www.nationalaglawcenter.org/assets/cases/moon.html>). The Idaho court found no direct authority under Idaho law that the right to maintain a nuisance was an easement. *Moon*, 96 P.3d at 644.

85. *Lindsey v. DeGroot*, 898 N.E.2d 1251 (Ind. Ct. App. 2009) (a summary of this opinion written by Paul Goeringer is available at <http://www.nationalaglawcenter.org/assets/cases/lindsey.html>). The Indiana court also found no authority in Indiana "that the right to maintain a nuisance is an easement . . ." *Lindsey*, 898 N.E.2d at 1259.

86. Centner, *supra* note 5, at 138.

87. *Id.*

88. *Id.* at 139.

89. *Id.*

### III. CONCLUSION

The Act provides many different statutory defenses to protect agricultural operations in the state. The Act covers traditional agricultural operations, such as rice, soybeans, and cattle. The Act may also cover newer, non-traditional agricultural operations, but this would be up to a court to decide.

A producer has three possible statutory defenses to use in potential nuisance litigation brought by neighboring landowners: 1) use of accepted agricultural practices; 2) the “coming to the nuisance” defense; and 3) a one-year statutory limitations period. Each defense is independent of the others, and a producer only needs to qualify for one of the three. When facing a nuisance challenge in court, agricultural operators can pick the defense that best meets their situation. Finally, if the producer wins the nuisance action, the producer would be able to collect attorney’s fees and other costs from the neighboring landowner under the law.

Producers must also make sure their actions do not fall under an exemption to the Act. Producers cannot maintain protection if they pollute stream water, change the condition of a stream’s water, or cause water to overflow on the property of another. A producer engaging in any of these three actions loses the protections of the Act. The Act also does not provide a defense to violations of other federal or state laws. To maintain the statutory defenses provided by the Act, producers must abide by these restrictions.

The Act also limits the impact of county and local ordinances on agricultural operations. The ordinances could not make the agricultural operation into a nuisance, but other regulatory ordinances that do not make an agricultural operation into a nuisance could exist under the Act.

Finally, in comparing the Act to the works of other legal scholars, the Act appears to be constitutional. A legislature’s adoption of the coming to the nuisance defense is a permissible use of state law. Additionally, the one-year limitation period allows a window of time for neighboring landowners to bring claims. The Act does not appear to have the same problems as Iowa’s right-to-farm law, but this is ultimately a question that will have to be answered by an Arkansas Court.

The Act has been offering the state’s agricultural producers statutory nuisance defenses and protections from local and county ordinances for close to thirty years. In that time, the Act has not been challenged in court. As areas of Arkansas continue to urbanize, the Act may see some legal challenges to the extent of its protections. Agricultural producers can only hope that Arkansas courts will interpret the Act in their favor.

# THE FORGOTTEN HALF OF FOOD SYSTEM REFORM: USING FOOD AND AGRICULTURAL LAW TO FOSTER HEALTHY FOOD PRODUCTION

*Emily Broad Leib\**

I. Introduction.....	18
II. Background: The Food System and the Obesity Crisis.....	20
III. Two Main Responses.....	25
A. <i>Option 1: Reforming the Industrial System</i> .....	26
B. <i>Option 2: Improving Viability of the Alternative Food System</i> .....	31
1. Demand for Healthy Food is Increasing, yet too little of Our current production focuses on specialty crops.....	34
2. Reforming the Industrial Food System Alone will not Ensure Increased Production of Healthy Foods on the timetable needed.....	36
3. Supporting the Alternative Food System is Necessary to the goal of Making Healthy Foods More Available and Affordable.....	38
IV. Barriers to the Alternative Food System.....	40
A. <i>Programmatic and Policy Barriers to Small Food Producers</i> .....	40
B. <i>Legal and Regulatory Hurdles</i> .....	45
C. <i>Barriers to Mid-Size Producers and the Agriculture Of the Middle</i> .....	50
V. The Role for Lawyers in Supporting the Alternative Food System.....	55
A. <i>Provide Legal Assistance to Alternative Food System Producers</i> .....	57
B. <i>Advocate for Policy Change to Reduce Barriers to Small Food Producers</i> .....	59
VI. Conclusion.....	60

---

\* Emily Broad Leib is Director of the Harvard Law School Food Law and Policy Clinic. The author would like to thank the AALS Agricultural and Food Law Section for the invitation to present on this topic; Margaret Sova McCabe, Susan Schneider, Baylen Linnekin, Nathan Rosenberg, Steven Herman, and Sarah Downer for their helpful feedback; and Ona Balkus for diligent and insightful research assistance.

## I. Introduction

America is facing widespread problems with its food system, including environmental harms due to externalities from industrial farms;<sup>1</sup> the increasing amount of “food miles” traveled by the products that make up our daily meals;<sup>2</sup> and the growing size and complexity of recent outbreaks of foodborne illnesses.<sup>3</sup> Indeed, the entire system that covers the life cycle of food, through production, processing, distribution, consumption, and food waste management, is in crisis. One of the most disturbing of these well-documented problems with the industrial food system is the increase in rates of obesity and diet-related illnesses. Obesity rates in the U.S. have more than doubled since 1980.<sup>4</sup> Rising rates of obesity stem from what has been called a “toxic” food culture, in which unhealthy food products are cheap and readily available,<sup>5</sup> while healthy foods are unavailable in many urban and rural food deserts<sup>6</sup> or out of reach for those with limited economic means.<sup>7</sup>

---

1. See, e.g., William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 251-72 (2009); J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 274-93 (2000); Susan A. Schneider, *Reconsidering the Industrialization of Agriculture*, 26 J. ENVTL. L. & LITIG. 19, 21-25 (2011).

2. See, e.g., Rich Pirog & Andrew Benjamin, *Checking the Food Odometer: Comparing Food Miles for Local Versus Conventional Produce Sales to Iowa Institutions*, LEOPOLD CENTER FOR SUSTAINABLE AGRIC., 1 (2003), available at <http://www.leopold.iastate.edu/sites/default/files/pubs-and-papers/2003-07-checking-food-odometer-comparing-food-miles-local-versus-conventional-produce-sales-iowa-institution.pdf>; Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL'Y 45, 50 (2008); Lauren Kaplin, *Energy (In)efficiency of the Local Food Movement: Food for Thought*, 23 FORDHAM ENVTL. L. REV. 139 (2012).

3. See, e.g., Michael T. Roberts, *Mandatory Recall Authority: A Sensible and Minimalist Approach to Improving Food Safety*, 59 FOOD & DRUG L.J. 563, 565 (2004); Nathan M. Trexler, “Market” Regulation: Confronting Industrial Agriculture's Food Safety Failures, 17 WIDENER L. REV. 311, 330 (2011).

4. See Cynthia L. Ogden et al., *Prevalence of Overweight and Obesity in the United States, 1999–2004*, 295(13) J. AM. MED. ASS'N 1549 (Apr. 2006).

5. See, e.g., E. Katherine Battle & Kelly D. Brownell, *Confronting a Rising Tide of Eating Disorders and Obesity: Treatment vs. Prevention and Policy*, 21 ADDICTIVE BEHAV. 755, 761-62 (1996); Katherine Pratt, *A Constructive Critique of Public Health Arguments for Anti-obesity Soda Taxes and Food Taxes*, 87 TUL. L. REV. 73, 115-16 (2012).

6. Nareissa Smith, *Eatin' Good? Not in This Neighborhood: A Legal Analysis of Disparities in Food Availability and Quality at Chain Supermarkets in Poverty-Stricken Areas*, 14 MICH. J. RACE & L. 197, 216 (2009) (discussing the lack of food access in low-income, generally minority communities but not using the term “food

To improve public health outcomes, and mitigate the impact of obesity and related illnesses, our food and agricultural system requires a transformation. Most discussions about how to overhaul our food and agriculture system focus on reforming or dismantling the industrial, commodity-based food system by erecting barriers to the production and sale of unhealthy, overly-processed foods. This could entail reducing or eliminating agricultural subsidies, utilizing taxes or regulations to force industrial food producers to internalize the costs of their negative impacts on health and the environment, or decreasing consumer access to or demand for these products by implementing marketing restrictions, labeling requirements, or bans on certain foods or ingredients.

While we will surely need to reform and reign in the industrial food system, this article contends that those reforms are only part of the battle, and will not necessarily make healthier foods more readily available in the immediate future. We also need to think about the other half of the picture—increasing the production and availability of healthier foods—which will require improving the climate for the production of healthy “specialty crops” (defined as “fruits, vegetables, tree nuts, dried fruits, horticulture, and nursery crops”).<sup>8</sup> This avenue would lead to a focus on supporting alternative, small and mid-size food producers, who are and will likely remain the primary producers of specialty crops, and would require investments of time, energy, and resources into alternative food production. To encourage sufficient production of specialty crops, we must also reduce the programmatic, policy, and legal barriers that stand in the way of these producers.

This article first describes the obesity and public health issues facing the United States and explains their links to the food and agricultural

---

desert”); Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 935, 955 (2010); *Good Food: Examining the Impact of Food Deserts on Public Health in Chicago*, MARI GALLAGHER RESEARCH AND CONSULTING GRP., 5 (2006), available at [http://www.marigallagher.com/site\\_media/dynamic/project\\_files/Chicago\\_Food\\_Desert\\_Report.pdf](http://www.marigallagher.com/site_media/dynamic/project_files/Chicago_Food_Desert_Report.pdf); Tess Feldman, *Re-Stocking the Shelves: Policies and Programs Growing in Food Deserts*, 16 PUB. INT. L. REP. 38, 39 (2010).

7. *Food Security in the U.S.: Key Statistics and Graphics*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., <http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics.aspx#foodsecure> (last updated Sept. 4, 2012) (noting that 14.9 percent of U.S. households, or 17.9 million people, were food insecure at some time during 2011).

8. *Specialty Crop Block Grant Program—Farm Bill*, U.S. DEP’T OF AGRIC., AGRIC. MKTG. SERV., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=SpecialtyCropBlockGrant%20Program&rightNav1=SpecialtyCropBlockGrant%20Program&topNav=&leftNav=&page=SCBGP&resultType=&acct=fvgrntprg> (last visited Feb. 20, 2013).

system. Part III then discusses the two primary avenues for food system reform and illustrates the reasons we should focus more energy and resources than we currently do on supporting alternative food producers. Part IV. lays out some key barriers to alternative food producers—including programmatic and policy barriers, legal and regulatory hurdles, and obstacles that particularly impact mid-scale food producers, even though these mid-scale producers offer the most potential to increase healthy food access on the scale needed. Finally, Part V discusses the reasons for which the legal profession should use its unique skills to support alternative food producers and presents several important ways in which attorneys can play a key role in improving the viability of the alternative food system, thus promoting better public health outcomes by ensuring that fruits, vegetables, and other healthy foods will become more readily available.

## II. Background: The Food System and the Obesity Crisis

The United States, along with the rest of the globe, is in the midst of an obesity epidemic.<sup>9</sup> In 2010, the majority of Americans weighed more than medically recommended, with approximately 36 percent considered to be obese and an additional 33 percent overweight.<sup>10</sup> With some recent exceptions in specific populations,<sup>11</sup> rates of obesity among children have been steadily climbing as well, with data showing a nearly 17 percent obesity rate among children and teens.<sup>12</sup> In addition to the high obesity rates, just over 8 percent of Americans suffer from diabetes and approximately 35 percent are pre-diabetic.<sup>13</sup> Indeed, three of the top causes

---

9. See High Level Meeting on Non-communicable Diseases, GEN. ASSEMBLY OF THE UNITED NATIONS, <http://www.un.org/en/ga/president/65/issues/ncdiseases.shtml> (last visited Feb. 25, 2013); *The Maladies of Affluence*, THE ECONOMIST (Aug. 9, 2007), <http://www.economist.com/node/9616897>.

10. Katherine M. Flegal, et al., *Prevalence of Obesity and Trends in the Distribution of Body Mass Index Among US Adults, 1999-2010*, 307(5) J. AM. MED. ASS'N 491, 493 (2012).

11. Liping Pan et al., *Trends in the Prevalence of Extreme Obesity Among US Preschool-Aged Children Living in Low-Income Families, 1998-2010*, 308(24) J. OF THE AM. MED. ASS'N 2563, 2564 (2012) (finding a small but significant decline in obesity and extreme obesity rates from 2003 to 2010 in low-income children ages 2-4 in certain populations).

12. Cheryl D. Fryar, et al., *Prevalence of Obesity Among Children and Adolescents: United States, Trends 1963-1965 Through 2009-2010*, Centers for Disease Control and Prevention, Nat'l Center for Health Statistics, 5 (2012), available at [http://www.cdc.gov/nchs/data/hestat/obesity\\_child\\_09\\_10/obesity\\_child\\_09\\_10.pdf](http://www.cdc.gov/nchs/data/hestat/obesity_child_09_10/obesity_child_09_10.pdf).

13. *National diabetes fact sheet: national estimates and general information on diabetes and prediabetes in the United States*, U.S. Dep't of Health and Human Serv.,

of death in the United States (heart disease, cancer, and stroke) have been linked consistently with poor diet.<sup>14</sup>

U.S. healthcare spending reflects these high rates of obesity and diet-related disease.<sup>15</sup> For example, 27 percent of the increase in healthcare expenditures from 1987-2001 was blamed on obesity,<sup>16</sup> and in 2006, per capita healthcare expenses were 42 percent higher for obese individuals than for those with normal weight.<sup>17</sup> The estimated medical care cost of obesity in the United States in 2008 was \$147 billion.<sup>18</sup> In reality, the total cost is much higher, as overweight and obesity have been linked to numerous diseases—including heart disease, type 2 diabetes, certain cancers, and Alzheimer's Disease—which have their own associated costs.<sup>19</sup> Further, all of these health problems lead to lost productivity and lost work days, posing additional costs beyond just dollars spent on medical care.<sup>20</sup>

The high incidence of overweight and obesity should come as no surprise, given the food that is readily available and affordable for most Americans and is the center of the American diet. According to data from the U.S. Department of Agriculture (USDA), Americans consumed a daily average of roughly 450 more calories in 2010 than in 1970.<sup>21</sup> Consumption

Centers for Disease Control and Prevention, 1 (2011), *available at* [http://www.cdc.gov/diabetes/pubs/pdf/ndfs\\_2011.pdf](http://www.cdc.gov/diabetes/pubs/pdf/ndfs_2011.pdf).

14. See, e.g., Richard J. Jackson et al., *Agriculture Policy Is Health Policy*, 4 J. HUNGER ENVTL. NUTRITION 393, 394 (2009).

15. In 2011, the U.S. spent \$2.7 trillion, or 17.9 percent of its GDP, on healthcare. Micah Hartman et al., *National Health Spending In 2011: Overall Growth Remains Low, But Some Payers And Services Show Signs Of Acceleration*, 32(1) HEALTH AFFAIRS 87, 88 (2013). Seventy-five percent of our annual spending is attributable to chronic disease, much of which is linked with poor diet. *The Power to Prevent, The Call to Control: At A Glance 2009*, CENTERS FOR DISEASE CONTROL AND PREVENTION, CHRONIC DISEASES (2009), <http://www.cdc.gov/chronicdisease/resources/publications/aag/chronic.htm> (last visited Feb. 20, 2013).

16. Kenneth E. Thorpe, et al., *The Impact of Obesity On Rising Medical Spending*, HEALTH AFF. Web Exclusives: W4-480, W4-485 (2004), <http://content.healthaffairs.org/content/early/2004/10/20/hlthaff.w4.480.full.pdf>.

17. Eric A. Finkelstein, et al., *Annual Medical Spending Attributable To Obesity: Payer-And Service-Specific Estimates*, 28(5) HEALTH AFF. w822, w826 (2009), *available at* <http://content.healthaffairs.org/content/28/5/w822.full.pdf>.

18. *Id.* at w828.

19. *Overweight and Obesity: Causes and Consequences*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/obesity/adult/causes/index.html> (last updated April 27, 2012).

20. See Barry M. Popkin et al., *Measuring the full economic costs of diet, physical activity and obesity-related chronic diseases*, 7(3) OBESITY REV. 271, 272 (2006).

21. Between 1970 and 2010, the average daily per capita calories from U.S. food availability, adjusted for spoilage and other waste, increased from 2,076 to 2,534. *Loss*



of “corn calories” (calories from corn flour, corn meal, hominy, and corn starch) has increased 198 percent since 1970, and that of corn sweetener calories rose by 305 percent.<sup>22</sup> At the same time, world sugar consumption has tripled over the past 50 years and, because sugar and other sweeteners are added to so many processed foods, “people are consuming an average of more than 500 calories per day from added sugar alone.”<sup>23</sup> In contrast, there has been only a 26 percent increase in the amount of calories that Americans receive from fruit each day, and a 5.5 percent *reduction* in calories from vegetables.<sup>24</sup> Americans today are eating more than ever, and a greater proportion of their food intake comes from unhealthy, highly-processed items as opposed to healthy, fresh fruits and vegetables.

Not only are these unhealthy foods readily available and affordable, but in many parts of the country, Americans over-consume these foods because they suffer from economic and geographic barriers to accessing alternative, healthier foods. According to the USDA, nearly 15 percent of U.S. households, or 18 million people, were food insecure—meaning they did not have access “at all times to enough food for an active, healthy life” at some time during 2011.<sup>25</sup> Similarly, a 2012 USDA report found that almost 10 percent of the U.S. population, approximately 30 million people,

---

*adjusted food availability, Calories Table*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV. (Nov. 2012), <http://www.ers.usda.gov/Data/FoodConsumption/FoodGuideIndex.htm>.

22. These figures were calculated by determining the percentage increase from the calories available daily in the U.S. based on exports, imports, and food losses between 1970 and 2010. For corn products, the calories available daily rose from 36.1 to 107.4 between 1970 and 2010 and for corn sweeteners the calories available daily rose from 44.2 to 178.9 between 1970 and 2010. The Economic Research Services uses food availability data as a proxy for food consumption (see Summary Findings). *Loss adjusted food availability, Grains Table, Total Corn Products tab and Sugar Table, Corn Sweeteners tab*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV. (Nov. 2012), <http://www.ers.usda.gov/Data/FoodConsumption/FoodGuideIndex.htm>.

23. Robert H. Lustig, et al., *The Toxic Truth About Sugar*, 482 NATURE 27, 28 (Feb. 2012).

24. For fruit, the calories available daily rose from 64.8 to 81.8 between 1970 and 2010. For vegetables, the calories available daily declined from 132.0 to 124.8 between 1970 and 2010. *Loss adjusted food availability, Fruit Table and Vegetables Table*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV. (Nov. 2012), <http://www.ers.usda.gov/Data/FoodConsumption/FoodGuideIndex.htm>.

25. *Food Security in the U.S., Key Statistics and Graphics*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., <http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics.aspx#foodsecure> (last updated Sept. 4, 2012). The USDA defines food security as “access by all people at all times to enough food for an active, healthy life.” *Food Security in the U.S., Overview*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV. <http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us.aspx> (last updated Sept. 4, 2012).

live in food deserts,<sup>26</sup> areas that “lack access to affordable fruits, vegetables, whole grains, low-fat milk, and other foods that make up the full range of a healthy diet.”<sup>27</sup> Even those who have access to grocery stores and retail outlets where they can purchase fresh, healthy foods often have limited options due to the high cost of healthy food products relative to unhealthy ones.<sup>28</sup> Between 1985 and 2000, the inflation-adjusted price of fresh fruits and vegetables rose by 39 percent, while the price of carbonated soft drinks decreased by nearly 24 percent over the same time period.<sup>29</sup> Those in communities without access to large supermarkets or retail outlets suffer the most: according to one study, groceries in smaller

---

26. Michele Ver Ploeg et al., *Access to Affordable and Nutritious Food: Updated Estimates of Distance to Supermarkets Using 2010 Data*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., ERR 143, iii (Nov. 2012), <http://www.ers.usda.gov/media/956784/err143.pdf> (data based on the 2010 Census, the 2006-2010 American Community Survey, and 2010 data on locations of supermarkets, supercenters, and large grocery stores). The USDA defines food deserts as low-income census tracts (poverty rate of twenty percent or higher or median family income at or below 80 percent of the area's median family income) where a substantial portion of the population has low access to supermarkets or large grocery stores (at least 500 people or at least 33 percent of the census tract's population resides more than one mile from a supermarket or large grocery store; the distance is increased to ten miles in the case of rural areas). *Food Desert Locator, About the Locator*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., <http://www.ers.usda.gov/Data/FoodDesert/documentation.html> (last updated Aug. 6, 2012).

27. *A Look Inside Food Deserts*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/features/fooddeserts/> (last updated Sept. 24, 2012).

28. Pablo Monsivais, et al., *Following Federal Guidelines to Increase Nutrient Consumption May Lead To Higher Food Costs for Consumers*, 30(8) HEALTH AFF. 1 (Aug. 2011) (noting that nutrient-dense, healthy foods cost more than calorie-dense foods with minimal nutritional value). But note, a recent USDA report attested that healthy foods are not more expensive (and in some cases, may be less expensive) than unhealthy options. See Andrea Carlson & Elizabeth Frazão, *Are Healthy Foods Really More Expensive? It Depends on How You Measure the Price*, U.S. DEPT OF AGRIC., ECON. RESEARCH SERV., EIB 96 (May 2012), available at [http://www.ers.usda.gov/media/600474/eib96\\_1\\_.pdf](http://www.ers.usda.gov/media/600474/eib96_1_.pdf). However, this report does not take into account many of the secondary costs of healthy food items (electricity and gas costs for storage and preparation; expenses for purchasing and maintaining cooking appliances; higher food waste as healthy foods are more likely to spoil; increased transportation costs as more trips are needed to maintain a supply of healthy foods; etc.). The study also does not account for the challenges faced by many citizens in accessing fresh, healthy foods in their local communities, or the fact that in many communities, residents are constrained by purchasing the foods available at small corner stores, which have limited healthy options and often charge higher prices for those food items.

29. David Wallinga, *Agricultural Policy and Childhood Obesity: A Food Systems and Public Health Commentary*, 29(3) HEALTH AFF. 405, 407 (2010).

stores cost an average of 10 percent more than the same items in larger supermarkets.<sup>30</sup>

Lack of access to healthy foods, due to both economic constraints and geographic barriers, has been linked with increased rates of overweight and obesity. With regard to economic constraints, over 35 percent of individuals earning less than \$15,000 per year were obese compared to 24.5 percent of adults earning \$50,000 or more per year.<sup>31</sup> Such figures are not surprising, as those who make more money are able to spend more on fresh, healthy foods. As evidence, households with incomes above 300 percent of the Federal Poverty Level<sup>32</sup> spent over 50 percent per person more on fruits and vegetables than households with incomes at or below the Federal Poverty Level.<sup>33</sup>

Those who encounter geographic barriers to healthy food access also suffer disproportionately from poor health outcomes. According to a 2006 study, people living in areas without supermarkets had a 24 percent higher prevalence of obesity and 9 percent higher prevalence of overweight than those living in census tracts without supermarkets.<sup>34</sup> Along the same lines, a 2009 study found people living in a neighborhood with a large grocery store consumed 0.69 more servings of fruits and vegetables daily than those in neighborhoods without a grocery store.<sup>35</sup>

---

30. Michele Ver Ploeg et al., *Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences, Report to Congress*, U.S. DEP'T OF AGRIC., 14 (2009), available at <http://www.ers.usda.gov/publication/s/ap/ap036/ap036.pdf> (citing Phillip Kaufman et. al., *Rural poor have less access to supermarkets, large grocery stores*, 13(3) RURAL DEV. PERSP. 19 (1999) ("Overall, supermarkets had lower prices—about 10 percent lower nationwide, on average—than other grocery stores such as superettes, convenience stores, and 'mom and pop' stores"))).

31. *F as in Fat: How Obesity Threatens America's Future*, TRUST FOR AMERICA'S HEALTH 20 (2010), available at <http://healthyamericans.org/reports/obesity2010/Obesity2010Report.pdf>.

32. The Federal Poverty Level is approximately \$11,170 for an individual or \$23,050 for a family of four. *2012 HHS Poverty Guidelines*, Dep't of Health and Human Serv., <http://aspe.hhs.gov/poverty/12fedreg.pdf> (last visited Feb. 20, 2013).

33. Eli Rosenberg, *Chart: Fruit and Vegetables Only for the Rich?*, THE ATLANTIC WIRE (May 17, 2011) <http://www.theatlanticwire.com/national/2011/05/chart-less-fruit-and-less-vegetables-poor/37823/>.

34. Kimberly Morland, et al., *Supermarkets, Other Food Stores, and Obesity: The Atherosclerosis Risk in Communities Study*, 30(4) AM. J. OF PREVENTIVE MED. 333, 335 (2006).

35. Shannon N. Zenk et al., *Neighborhood Retail Food Environment and Fruit and Vegetable Intake in a Multiethnic Urban Population*, 23(4) AM. J. HEALTH PROMOTION 255, 258 (2009).

Faced with what some have called a “toxic”<sup>36</sup> or “obesogenic”<sup>37</sup> food system, in which unhealthy foods are cheap and ubiquitous while their healthy counterparts are comparatively expensive and inaccessible, Americans are consuming far too many unhealthy products and too little healthy food. Our regime of agricultural law, broadly encompassing the entire “network of laws and policies that apply to the production, marketing, and sale of agricultural products, i.e., the food we eat, the natural fibers we wear, and increasingly, the bio-fuels that run our vehicles,”<sup>38</sup> props up a food system that produces unhealthy, highly-processed foods, rather than supporting the production of foods that are needed for a healthy society. In order to change the relative cost and availability of healthy versus unhealthy foods, thereby reducing the rates of diet-related disease, we must modify our food and agricultural laws and policies to transform the food system and ensure that healthy foods are more affordable and available nationally.

### III. Two Main Responses

Over the past few years, there has been a more forceful push to overhaul our food system.<sup>39</sup> Two primary types of reform can improve the food and agricultural system. One avenue focuses on modifying or dismantling the industrial food system in order to decrease the production and consumption of unhealthy products, in hopes that this will eventually drive industry to generate more healthy foods. The other avenue aims to

---

36. Battle & Brownell, *supra* note 5, at 761.

37. Pamela Powell et al., *What Is Obesogenic Environment?*, U. NEV. COOP. EXTENSION, 2 (2010), available at <http://www.unce.unr.edu/publications/files/hn/2010/fs1011.pdf> (defining an “obesogenic environment” as an environment that promotes weight gain and is not conducive to weight loss); Boyd Swinburn, et al., *Dissecting Obesogenic Environments: The Development and Application of a Framework for Identifying and Prioritizing Environmental Interventions for Obesity*, 29 PREVENTIVE MED. 563, 564 (1999).

38. Susan Schneider, *What is Agricultural Law?*, Remarks Prepared for the Association of American Law Schools 2009 Annual Meeting (Jan. 6-10, 2009), 26 AGRIC. L. UPDATE 1 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1331422](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331422).

39. See, e.g., Dan Glickman et al., *Accelerating Progress in Obesity Prevention: Solving the Weight of the Nation*, INST. OF MED., 158 (2012), available at <http://www.whatthefolly.com/wp-content/uploads/2012/05/13275.pdf> (including as Strategy 2-5: “Broaden the examination and development of U.S. agriculture policy and research to include implications for the American diet”); see generally, Wallinga, *supra* note 29; Randolph Kline, et al., *Beyond Advertising Controls: Influencing Junk-Food Marketing and Consumption with Policy Innovations Developed in Tobacco Control*, 39 LOY. L.A. L. REV. 603, 613 (2006).

support increased production of specialty crops, in order to ensure that these healthy products will be more available and affordable, and thus can be consumed more readily. Unfortunately, the second avenue has been largely overlooked.<sup>40</sup> Part A describes the industrial food system and examines some of the food system modifications advocated by various scholars to reform this system. Part B defines the alternative food system and illustrates the reasons for which more attention should be focused on supporting alternative production, an avenue to improving the food system which has been comparatively overlooked, but which possesses great promise as a method of making healthy foods more abundant and affordable.

### *A. Option 1: Reforming the Industrial System*

In order to discuss food system reform, the first step is to define what is meant by the “industrial food system” that produces the majority of our food supply.<sup>41</sup> The term industrial food system generally refers to the network of large farms and agribusinesses that primarily cultivate monocultures of one or two commodity crops, defined as “mass produced article[s] that [are] readily exchanged within the market.”<sup>42</sup> Industrial producers focus on specialization and product uniformity;<sup>43</sup> are capital-intensive, reliant on off-farm inputs, including heavy use of various fertilizers and pesticides, generally apply an industrial manufacturing model to their production;<sup>44</sup> and implement production and distribution chains that are national and global in scale.<sup>45</sup>

---

40. Jeffrey K. O'Hara, *Ensuring the Harvest: Crop Insurance and Credit for a Healthy Farm and Food Future*, UNION OF CONCERNED SCIENTISTS, v (April 2012), available at [http://www.ucsusa.org/assets/documents/food\\_and\\_agriculture/ensuring-the-harvest-full-report.pdf](http://www.ucsusa.org/assets/documents/food_and_agriculture/ensuring-the-harvest-full-report.pdf) (“One largely untried way in which government policy could encourage Americans to eat more healthy foods is by making it easier for farmers to grow more of them, which would increase their availability to consumers.”).

41. See, e.g., Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 213 (1993) (“American agriculture is changing rapidly—becoming more concentrated, more technically advanced, and more integrated with the input and marketing sectors. In other words, American agriculture is rapidly becoming industrialized.”).

42. *Foreign Trade: Trade Definitions*, U.S. CENSUS BUREAU, <http://www.census.gov/foreign-trade/reference/definitions/index.html#C> (last visited Feb. 11, 2013).

43. See, e.g., Mark A. Grey, *The Industrial Food Stream and its Alternatives in the United States: An Introduction*, 59(2) HUMAN ORG. 143, 144-45 (2000); Eubanks II, *supra* note 1, at 227; Schneider, *supra* note 1, at 19.

44. See, e.g., Leo Horrigan, et al., *How Sustainable Agriculture Can Address the Environmental and Human Health Harms of Industrial Agriculture*, 110(5) ENVTL.

The industrial food system has achieved great levels of efficiency and, for better or worse, Americans benefit by spending a smaller percentage of their income on food costs than any nation at any time.<sup>46</sup> But although the American agricultural system is as productive as ever, we are not generating enough of the types of foods, particularly fruits and vegetables, that modern nutrition science and the U.S. Dietary Guidelines for Americans recommend for our population to consume.<sup>47</sup> Instead, the incredible efficiency of industrial food system production allows for an inundation of excess commodities, which support the manufacturing of cheap, highly-processed food products.<sup>48</sup> Such food products—processed meats, packaged foods, fast foods, sugar-sweetened beverages, and similar highly-processed items—are the types of foods specifically linked with high rates of obesity and chronic disease.<sup>49</sup>

To make matters worse, these highly-productive, highly-subsidized commodity farms do not grow fruits and vegetables, and are generally prohibited from growing fruits and vegetables on Farm Bill-supported acres.<sup>50</sup> The Farm Bill has existed for nearly a century, but the modern era

HEALTH PERSP. 445 (2002); Eubanks II, *supra* note 1, at 251, 269-70; Schneider, *supra* note 1.

45. See, e.g., Grey, *supra* note 43.

46. Michael Pollan, *The Food Movement Rising*, N.Y. REVIEW OF BOOKS (Aug. 19, 2010), <http://www.nybooks.com/articles/archives/2010/jun/10/food-movement-rising/?pagination=false> (stating that “Americans spend a smaller percentage of their income on food than any people in history—slightly less than 10 percent”); Scott Fields, *The Fat of the Land: Do Agricultural Subsidies Foster Poor Health?*, 112(14) ENVTL. HEALTH PERSP. A820, A822 (2004) (noting that “[t]he proportion of income required to buy food in the United States is among the lowest in the world and has declined steadily since the 1950s”).

47. See *infra* notes 83 - 86 and accompanying text.

48. David Wallinga, et al., *Considering the Contribution of U.S. Agricultural Policy to the Obesity Epidemic: Overview and Opportunities*, 4 J. HUNGER & ENVTL. NUTRITION 3, 5 (2009); Heather Schoonover & Mark Muller, *Food without Thought: How U.S. Farm Policy Contributes to Obesity*, INST. FOR AGRIC. AND TRADE POLICY, 4 (2006).

49. Dariush Mozzafarian & David S. Ludwig, *Dietary Guidelines in the 21<sup>st</sup> Century: A Time for Food*, 304(6) J. AM. MED. ASS’N 681 (2010).

50. *Planting Flexibility for Fruits & Vegetables*, NAT’L SUSTAINABLE AGRIC. COAL., <http://sustainableagriculture.net/publications/grassrootsguide/competitive-markets-commodity-program-reform/planting-flexibility-for-fruits-vegetables/> (last visited Feb. 14, 2013) (The prohibition does not apply if the producer has a history of producing these crops, but the producer still suffers from a reduction in subsidies payments acre-for-acre); Demcey Johnson et al., *Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., ERR 30, v (2006), available at <http://webarchives.cdlib.org/wayback>.

has seen a concentration of subsidies for the benefit of a small group of commodity crops.<sup>51</sup> To illustrate, the original Farm Bill, the American Agricultural Act of 1933,<sup>52</sup> aimed to support small farms and invest in a range of crops—over 100 different crops received support in early farm bills.<sup>53</sup> But as times have changed, so have the subsidies. Between 1997 and 2006, approximately 84 percent of the \$172 billion dollars of Farm Bill subsidies went to five commodity crops alone: corn, rice, wheat, soybeans, and cotton.<sup>54</sup> As a result, “farmers are using the majority of American cropland for a few low-nutrient crops solely because these crops are favored by federal agricultural policy.”<sup>55</sup> These subsidies have not been altered in the face of changing nutrition science or the rising rates of obesity and diet-related disease.<sup>56</sup> Even though the new U.S. Dietary Guidelines for Americans recommend that the majority of one’s diet consist of fruits, vegetables, and whole grains, fruit and vegetable producers do not receive any direct subsidies.<sup>57</sup> By contrast, over 70% of farm payments went to corn, wheat, rice, soybeans, and feedgrains—all of which are used to produce sweeteners, oils, and meat, even though the Dietary Guidelines encourage moderation for all of those products—while another 26.2 percent of the subsidies went to cotton, rather than to healthy food items.<sup>58</sup> These subsidies make commodity crops, and the food

---

public/UERS\_ag\_1/20110903171556/http://ers.usda.gov/publications/err30/err30\_high res.pdf.

51. The USDA defines “covered commodity” or “program commodity” as “Commodities for which Federal support programs are available to producers, including wheat, corn, barley, grain sorghum, oats, upland cotton, medium and long grain rice, oilseeds, and pulse crops (small and large chickpeas, dry beans and lentils). Programs for peanuts are separate in the 2002 and 2008 Farm Acts but are similar to those for covered commodities.” *Farm and Commodity Policy*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., [http://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/glossary.aspx#Considered planted](http://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/glossary.aspx#Considered%20planted) (last visited Feb. 17, 2013).

52. Agricultural Adjustment Act, Pub. L. No. 73-10, 48 Stat. 31, 1933.

53. Eubanks II, *supra* note 1, at 221.

54. *Id.* at 227.

55. *Id.* at 280.

56. Note that the draft Farm Bill that passed the Senate and was discussed in the House in 2012 would have eliminated direct subsidy payments, but both versions still maintained support for the same commodity crops via subsidized crop insurance and a range of other programs. See Agriculture Reform, Food and Jobs Act of 2012, S. 3240, 112th Cong. (2012); Federal Agriculture Reform and Risk Management Act of 2012, H.R. 6083, 112th Cong. (2012).

57. Randy Schnepf, *Measuring Equity in Farm Support Levels*, CONG. RESEARCH SERV., RL34053, 4 (July 20, 2010), available at [http://assets.opencrs.com/rpts/RL34053\\_20100720.pdf](http://assets.opencrs.com/rpts/RL34053_20100720.pdf).

58. *Id.* at 6, Fig. 3. According to one estimate, fruits and vegetables only receive 2 percent of federal agricultural subsidies; 15 percent of agricultural subsidies went

products that use these crops as inputs, artificially cheap and affordable, thus steering the American diet towards those foods.<sup>59</sup>

With a system that is so imbalanced, and with rates of obesity and diet-related disease climbing as high as they have, it is not hard to see why many scholars have called for reforms to force the industrial food system to produce more nutritious foods or reduce the ability of consumers to purchase unhealthy ones. These scholars have suggested a range of approaches, such as: creating barriers to the consumption of unhealthy foods using taxes or bans;<sup>60</sup> restricting the ability of corporations to advertise unhealthy foods, particularly to vulnerable populations such as children;<sup>61</sup> using class action litigation to force industry-wide reform;<sup>62</sup> and of course reducing or eliminating Farm Bill subsidies for commodity crops,

towards crops that become sweeteners, starches, oil, and alcohol; and 63 percent went toward crops grown solely for feed for livestock. *Agriculture and Health Policies in Conflict: How Food Subsidies Tax Our Health, Agricultural Policies versus Health Policies*, PHYSICIANS COMMITTEE FOR RESPONSIBLE MED. (April 2011), <http://www.pcrm.org/health/reports/agriculture-and-health-policies-ag-versus-health>.

59. See, e.g., Eubanks II, *supra* note 1, at 280-81; Jackson et al., *supra* note 14, at 393-400. But see Julian M. Alston, et al., *Impact of Agricultural Policies on Caloric Consumption*, Trends in Endocrinology and Metabolism, SCIENCE DIRECT (Jan. 2013) (finding that agricultural policies have had mixed effects on prices of commodities, negligible effects on consumer prices, and negligible effects on consumption and obesity); Sonia M. Grandi & Caroline Franck, *Agricultural Subsidies: Are They a Contributing Factor to the American Obesity Epidemic?*, 172(22) J. AM. MED. ASS'N 1754 (Dec. 2012) (arguing that the extent of the Farm Bill impact on the obesity epidemic is unclear).

60. See, e.g., Lawrence O. Gostin et al., *Assessing Laws and Legal Authorities for Obesity Prevention and Control*, 37 J.L. MED. & ETHICS 28, 31 (2009); Kline et al., *supra* note 39, at 613; Tatiana Andreyeva, et al., *Estimating the Potential of Taxes on Sugar-sweetened Beverages to Reduce Consumption and Generate Revenue*, 52 PREVENTIVE MED. 413 (2011).

61. See, e.g., J. Michael McGinnis, et al., *Food Marketing to Children and Youth: Threat or Opportunity?* INST. OF MED., COMM. ON FOOD MKTG. AND THE DIETS OF CHILDREN AND YOUTH (2005), available at <http://www.iom.edu/Reports/2005/Food-Marketing-to-Children-and-Youth-Threat-or-Opportunity.aspx>; Gostin et al., *supra* note 60 at 31; Lauren Kaplin, *A National Strategy to Combat the Childhood Obesity Epidemic*, 15 U.C. DAVIS J. JUV. L. & POL'Y 347, 393-99 (2011); Jennifer L. Pomeranz, *Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate*, 38 J. L. MED. & ETHICS 98 (2010).

62. See, e.g., Margaret Sova McCabe, *The Battle of the Bulge: Evaluating Law As A Weapon Against Obesity*, 3 J. FOOD L. & POL'Y 135, 138 (2007) (noting that, "[l]itigation, while an undesirable substitute for public health policy-making, has actually made the greatest strides in bringing change to food choices in America"); Kline et al., *supra* note 39, at 613.



as a means of driving down the overproduction of these crops.<sup>63</sup> Despite the true need for improvement of the industrial food system, these reform efforts are stalled, due primarily to a lack of political will. For example, despite acknowledgement of the obesity epidemic, proposals in the 2008 Farm Bill reauthorization to eliminate or amend the prohibition on fruit and vegetable production on commodity acres were defeated.<sup>64</sup>

Further, some of these reforms may not be sufficient to improve the food system. Banning unhealthy foods has been met with considerable backlash,<sup>65</sup> as have efforts to restrict marketing<sup>66</sup> or require menu

63. See, e.g., Eubanks II, *supra* note 1, at 297-99; Wallinga, *supra* note 29, at 408-10; Anna O'Connor, *Fence Row to Fence Row: An Examination of Federal Commodity Subsidies*, 21 KAN. J. L. & PUB. POL'Y 432, 447 (2012).

64. *Planting Flexibility for Fruits & Vegetables*, NAT'L SUSTAINABLE AGRIC. COAL., <http://sustainableagriculture.net/publications/grassrootsguide/competitive-markets-commodity-program-reform/planting-flexibility-for-fruits-vegetables/> (last visited Feb. 20, 2013). However, both the Senate and House draft versions of the 2012 Farm Bill include language that would repeal direct payments to farms growing commodity crops, and thus would in effect eliminate the restrictions on fruit and vegetable production. Joseph V. Balagtas, et al., *Working Paper: Impact of the Fruit and Vegetable Planting Restriction on Crop Allocation in the United States*, CORNELL UNIV., CHARLES H. DYSON SCH. OF APPLIED ECON. AND MGMT., 4-5 (Nov. 2012), available at <http://dyson.cornell.edu/research/researchpdf/wp/2012/Cornell-Dyson-wp1214.pdf>; see Agriculture Reform, Food and Jobs Act of 2012, S. 3240, 112th Cong. § 1101(a) (2012); Federal Agriculture Reform and Risk Management Act of 2012, H.R. 6083, 112th Cong. § 1101(a) (2012) (repealing Sections 1103 and 1303 of the Food, Conservation, and Energy Act of 2008 (7 U.S.C. § 8713, 8753 (2007))). But note that because the subsidized crop insurance programs will still primarily support commodity crops, disincentives to specialty crop production will remain.

65. A recent move to ban the sale of sugar sweetened beverages above 16 ounces in restaurants, delis, movie theaters, and other vendors in New York City was met with much resistance and anger from both industry and consumers. N.Y.C. Health Code § 81.53 (2012); Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Bloomberg's Soda Ban, Poll Finds*, N.Y. TIMES (Aug. 22, 2012), <http://www.nytimes.com/2012/08/23/nyregion/most-new-yorkers-oppose-bloombergs-soda-ban.html>. A New York court subsequently struck down the portion cap rule, finding both that the Board of Health did not have the authority to promulgate the rule and that the rule was arbitrary and capricious. See, *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene*, 653584-2012, New York State Supreme Court, New York County (Manhattan); Michael Howard Saul, *Judge Cans Soda Ban*, THE WALL STREET JOURNAL (March 11, 2013), <http://online.wsj.com/article/SB10001424127887323826704578354543929974394.html>.

66. As an example, federal efforts to create voluntary principles to guide industry in what foods it should market to children was derailed after industry pushed back. See *infra* notes 94 - 96 and accompanying text.

labeling.<sup>67</sup> Impact litigation is costly and incredibly time-consuming, and its outcomes are uncertain.<sup>68</sup> More importantly, as the next sections will argue, these types of reforms alone will not necessarily lead to the provision of healthy foods in the immediate future and thus do not offer a complete solution unless they are paired with efforts explicitly aimed at increasing healthy food production. While scholars and policymakers should continue their efforts to reform the industrial food system, this article argues that those reforms will not be enough, and a focus on supporting the alternative food producers who can provide healthy foods is an essential other half of the policy equation.

### *B. Option 2: Improving Viability of the Alternative Food System*

In contrast to the path to reform that focuses on transforming or dismantling the industrial food system, there is the option of supporting the alternative food system in order to increase production—and thus availability—of fruits, vegetables, and other healthy options. In opposition to the industrial food system, the alternative food system is made up of a range of small or mid-size specialty crop producers. This article defines the “alternative food system” as consisting of farms that:

- are small (approximately 100 acres or under, selling less than \$250,000 per year)<sup>69</sup> or mid-size (100-500

---

67. See, e.g., *New York State Rest. Ass’n v New York City Bd. of Health*, 509 F Supp 2d 351, 353 (S.D.N.Y. 2007); *New York State Rest. Ass’n v New York City Bd. of Health*, 556 F3d 114, 118 (2d Cir. 2009); Thomas A. Farley et al., *New York City’s Fight Over Calorie Labeling*, 28(6) HEALTH AFFAIRS 1098 (Oct. 2009).

68. See, e.g., McCabe, *supra* note 62, at 148-49 (noting that “Pelman [v. McDonald’s Corp.] also indicates how costly food litigation can be in terms of judicial resources, attorneys fees, and media attention”); Kline et al., *supra* note 39, at 632 (noting that “barriers to a litigation approach exist, including potential difficulties forming a valid claim and the extreme cost of litigating against a powerful industry”).

69. Robert A. Hoppe, et al., *Small Farms in the United States: Persistence Under Pressure*, U.S. DEPT OF AGRIC., ECON. RESEARCH SERV. (Feb. 2010), [http://www.ers.usda.gov/media/147007/eib63\\_1\\_.pdf](http://www.ers.usda.gov/media/147007/eib63_1_.pdf) (defining small farms as those with annual sales under \$250,000); *2007 Census of Agriculture: Small Farms*, U.S. DEPT OF AGRIC., NAT’L AGRIC. STATISTICS SERVICE, [http://www.agcensus.usda.gov/Publications/2007/Online\\_Highlights/Fact\\_Sheets/Farm\\_Numbers/small\\_farm.pdf](http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Farm_Numbers/small_farm.pdf) (defining small farms as farms with \$250,000 or less in sales of agricultural commodities); *History and Philosophy*, SMALL FARM TODAY MAGAZINE, <http://www.smallfarmtoday.com/> (last visited Feb. 20, 2013) (defining “‘small farm’ as a farm that is 179 acres or less in size, or earns \$50,000 or less in gross income per year. This definition is based on data from the Bureau of Census and USDA Census (1987-1997), results of the Small Farm Today® magazine survey of readers (1993-1998), and data from the New Farm Committee of the University of Missouri and Lincoln University (1989)”; 7 U.S.C.A. § 2666(c) (2012) (“‘[S]mall farm’ means any

acres and selling from \$50,000 - \$500,000 per year);<sup>70</sup>

- operate diverse practices to produce a range of different specialty crops or a combination of specialty crops and animal-based products;<sup>71</sup> and
- primarily sell their products locally and regionally through either direct marketing to consumers or via smaller, regional distribution chains.<sup>72</sup>

Enhancing the alternative food system is essential to increase our supply of fruits and vegetables because these alternative food producers, if given more resources and support, would have the capacity to produce more healthy food products right away. This is not to say that specialty crop production on large-scale farms should be discounted. Large-scale production of fruits and vegetables could go even further towards making such products more available for Americans. To be sure, the fruit and vegetable industry in the United States has also become quite industrialized, particularly in certain regions of the country and in the production of particular crops, and with some negative consequences.<sup>73</sup> But because the majority of specialty crop production takes place on small or

---

farm (1) producing family net income from all sources (farm and nonfarm) below the median nonmetropolitan income of the State; (2) operated by a family dependent on farming for a significant though not necessarily a majority of its income; and (3) on which family members provide most of the labor and management.”).

70. *Characterizing Ag of the Middle and Values-Based Food Supply Chains*, AGRIC. OF THE MIDDLE (Jan. 2012), <http://www.agofthemiddle.org/archives/2012/01/characterizing.html#more> (defining mid-size farms as those that are “in the \$50,000-\$500,000 range of gross sales”); Fred Kirschenmann et al., *Why Worry About the Agriculture of the Middle?*, AGRIC. OF THE MIDDLE 1 (2004), <http://www.agofthemiddle.org/papers/whitepaper2.pdf> (last visited Feb. 19, 2013) (noting that “the bulk of these farms have gross annual sales between \$100,000 and \$250,000”); *but see* Robert A. Hoppe & David E. Banker, *Structure and Finances of U.S. Farms, Family Farm Report, 2010 Edition*, U.S. DEPT OF AGRIC., ECON. RESEARCH SERVICE, EIB 66, iv (2010), *available at* [http://www.ers.usda.gov/media/184479/eib66\\_1\\_.pdf](http://www.ers.usda.gov/media/184479/eib66_1_.pdf) (calling farms with sales from \$250,000 - \$499,999 “large farms” and those above \$500,000 “very large farms”).

71. This would include farms that are similar to the “healthy food farms” defined by the Union of Concerned Scientists as “farms that grow fruits, vegetables, and other healthy crops rather than crops such as corn and soybeans that are primary ingredients in processed foods.” O’Hara, *supra* note 40, at v.

72. Kirschenmann et al., *supra* note 70.

73. *See, e.g.* BARRY ESATABROOK, *TOMATOLAND: HOW MODERN INDUSTRIAL AGRICULTURE DESTROYED OUR MOST ALLURING FRUIT* (Andrews McMeel Publishing LLC, 2011).

mid-size farms,<sup>74</sup> this article will focus on those growers, and will recommend ways to increase the production of specialty crops by ramping up their operations. Supporting small and mid-scale specialty crop producers around the country, rather than boosting large-scale production in a few locations, can also increase the affordability of healthy foods by reducing shipping costs and decreasing consumer prices. Though not discussed in detail in this article, supporting these local and regional food producers can also address other food system concerns, for example, by improving environmental sustainability and augmenting local economic development.<sup>75</sup>

Many scholars have written about ways to reform the industrial food system,<sup>76</sup> and others have discussed reasons to support the local food movement,<sup>77</sup> but few have written about supporting the alternative food

74. See, e.g., *2007 Census of Agriculture: Vegetables, Potatoes, and Melons*, U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., [http://www.agcensus.usda.gov/Publications/2007/Online\\_Highlights/Fact\\_Sheets/Production/vpm.pdf](http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Production/vpm.pdf) (last modified Jan. 30, 2012) (noting that while the average size of U.S. farms is 418 acres, the average size for a vegetable, potato and melon farm is 228 acres). Indeed, with the exception of large-scale specialty crop production in states like Florida and California, most specialty crops are grown on a smaller scale than commodity crops. See Nicholas R. Johnson & A. Bryan Endres, *Small Producers, Big Hurdles: Barriers Facing Producers of "Local Foods"*, 33 HAMLINE J. PUB. L. & POL'Y 49, 52 (2011) (noting that, in 2007 California produced 84 percent of the head lettuce grown for U.S. consumption).

75. See generally *Market Forces: Creating Jobs through Public Investment in Local and Regional Food Systems*, UNION OF CONCERNED SCIENTISTS (Aug. 2011), [http://www.ucsusa.org/food\\_and\\_agriculture/solutions/expand-healthy-food-access/market-forces.html](http://www.ucsusa.org/food_and_agriculture/solutions/expand-healthy-food-access/market-forces.html); see Rich Pirog, et al., *Food, Fuel and Freeways: An Iowa Perspective on How Far Food Travels, Fuel Usage, and Greenhouse Gas Emissions*, LEOPOLD CTR. FOR SUSTAINABLE AGRIC., 1-2 (2001), [http://www.leopold.iastate.edu/pubs/staff/ppp/food\\_mil.pdf](http://www.leopold.iastate.edu/pubs/staff/ppp/food_mil.pdf) ("The conventional system used 4 to 17 times more fuel than the Iowa-based regional and local systems, depending on the system and truck type. The same conventional system released from 5 to 17 times more CO<sub>2</sub> from the burning of this fuel than the Iowa-based regional and local systems.").

76. See *supra* notes 60 - 63 and accompanying text.

77. For example, scholarship has analyzed the benefits of the local food movement through the lenses of creating opportunities for local economic development, see Neil D. Hamilton, *Rural Lands and Rural Livelihoods: Using Land and Natural Resources to Revitalize Rural America*, 13 DRAKE J. AGRIC. L. 179, 184 (2008); Kathryn A. Peters, *Creating A Sustainable Urban Agriculture Revolution*, 25 J. ENVTL. L. & LITIG. 203, 223 (2010) (noting that urban agriculture "promotes economic growth by allowing urban residents to supplement their income if they distribute their produce"). For more on reducing harmful environmental impacts, see Carmen G. Gonzalez, *Climate Change, Food Security, and Agrobiodiversity: Toward A Just, Resilient, and Sustainable Food System*, 22 FORDHAM ENVTL. L. REV. 493 (2011); Peters, *supra* note 76, at 220 (arguing that "a sustainable urban agricultural system would minimize the

system as a means to improve public health outcomes.<sup>78</sup> More attention and energy must be focused on fostering the alternative system for a range of reasons discussed below. Despite the array of programs targeted at increasing demand for healthy foods, we currently direct very little of our production capacity toward specialty crops, and merely reforming the industrial system will not ensure the production of substantially more healthy foods in the short-term. Thus, we must concentrate on the alternative food system as a viable solution to our short-term, and possibly long-term, food and nutrition needs.

1. Demand for healthy food is increasing, yet too little of our current production focuses on specialty crops

In response to the obesity epidemic, various U.S. policies and programs are already working to create more demand for healthy foods, but our supply of such food products falls short. While “governments can create powerful incentives for healthy eating and exercise,”<sup>79</sup> without access to the right foods, such governmental programs will not achieve success. As examples of this movement to shift demand, the new 2011 USDA MyPlate—based on the 2010 Dietary Guidelines for Americans—recommends that people eat half a plate of fruits and vegetables at every meal;<sup>80</sup> schools utilizing National School Lunch or National School Breakfast Program funds are required to serve more fruits and vegetables

---

impacts of food production on the planet”). For more on helping consumers to be closer to their food sources, see, e.g., Johnson & Endres, *supra* note 73, at 56; Derrick Braaten & Marne Coit, *Legal Issues in Local Food Systems*, 15 DRAKE J. AGRIC. L. 9, 10 (2010)).

78. Local foods may not be healthier than the same foods produced a long distance from the point of consumption, Johnson & Endres, *supra* note 73, at 89 (noting that “research has not conclusively established whether local food is in fact healthier than food that comes from far away”); Gabrielle O’Kane, *What is the real cost of our food? Implications for the environment, society and public health nutrition*, 15(2) PUB. HEALTH NUTRITION 268, 274 (2012) (noting that “researchers need to more clearly establish the links between use of local food systems and better eating habits and reductions in obesity and chronic disease”). However, “[p]romoting local food production and direct-farm marketing can help improve the nutritional health of the nation,” because local and regional systems are the primary sales routes for alternative food producers. Neil D. Hamilton, *Moving Toward Food Democracy: Better Food, New Farmers, and the Myth of Feeding the World*, 16 DRAKE J. AGRIC. L. 117, 124 (2011). Thus, supporting local food systems bolsters the alternative food system and will ultimately improve the accessibility and affordability of healthy food options.

79. Gostin et al., *supra* note 60, at 31.

80. ChooseMyPlate.gov, U.S. DEPT OF AGRIC., [www.choosemyplate.gov](http://www.choosemyplate.gov) (last visited Feb. 20, 2013).

than ever before;<sup>81</sup> and the food package for the Supplemental Nutrition Program for Women, Infants, and Children (WIC) now demands that more fruits and vegetables be available to program participants at all WIC vendor sites.<sup>82</sup>

Unfortunately, these attempts to address the obesity epidemic have primarily focused on changing consumer behaviors rather than looking at “upstream determinants,” namely, the food supply.<sup>83</sup> Despite the push to alter demand, our current agricultural outputs do not line up with the foods recommended or even required under the programs described above. The industrial food system has dramatically increased its efficiency in order to produce a surplus of calories, but the production of healthy foods is still inadequate. In 2009, the U.S. devoted less than 2 percent of its cropland to production of fruits and vegetables.<sup>84</sup> The United States currently produces 24 percent *fewer* servings of vegetables per person than is recommended in the Dietary Guidelines.<sup>85</sup> According to the USDA, in order for the U.S. to produce the amount of fruits and vegetables that the Dietary Guidelines recommend for consumption by Americans, we would have to add a combined 13 million new acres of fruit and vegetable production.<sup>86</sup> Without changing our policies to support food producers who are willing to generate more specialty crops, we will not have enough healthy food available to meet the Dietary Guidelines recommendations and other U.S. food program requirements, undermining the impact of efforts to combat obesity and chronic illness by improving diets.

---

81. 7 C.F.R. § 210.10 (2012).

82. Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Revisions in the WIC Food Packages, 75 Fed. Reg. 243, 79484 (Dec. 20, 2010) (codified at 7 C.F.R. § 246.10).

83. Jackson et al., *supra* note 14, at 395.

84. O’Hara, *supra* note 40, at 1.

85. Jean C. Buzby, et al., *Possible Implications for U.S. Agriculture from Adoption of Select Dietary Guidelines*, U.S. DEP’T OF AGRIC., ECON. RES. SERV., ERR 31 (2006), available at [http://www.ers.usda.gov/media/860109/err31\\_002.pdf](http://www.ers.usda.gov/media/860109/err31_002.pdf). Based on current U.S. production, only 36 percent of the recommended servings of dark green vegetables are available, and only 35 percent of the orange vegetables and 19 percent of the recommended legumes are available. *Id.* For dark-green leafy greens, availability would have to increase from 6,098 to 16,767 (million pounds) to meet the Dietary Guidelines. For orange vegetables, availability would have to increase from 6,077 to 17,171 (million pounds) to meet the Dietary Guidelines. For legumes, availability would have to increase from 3,348 to 17,796 (million pounds) to meet the Dietary Guidelines. *Id.* at table 6.

86. See *id.* (noting that fruit acreage would need to increase from 3.5 million to 7.6 million acres and vegetable acreage would need to increase from 6.48 million acres to 15.35 million acres); see also Patricia L. Farnese, *Remembering the Farmer in the Agriculture Policy and Obesity Debate*, 65 FOOD & DRUG L.J. 391, 398 (2010).

Some might argue that we could simply increase imports of fruits and vegetables to meet the U.S. demand for these foods, but this has obvious disadvantages, including increased fuel and shipping costs, food safety concerns, and implications for national security.<sup>87</sup> As point of fact, the Food and Drug Administration (FDA) has the resources to inspect less than 2 percent of all imported fish, vegetables, and fruit.<sup>88</sup> Instead of relying on international markets, the U.S. should focus on increasing domestic production of the foods that are necessary for a healthy diet by fostering the alternative food system.

## 2. Reforming the industrial food system alone will not ensure increased production of healthy foods on the timetable needed

Although the industrial food system reforms called for by many are essential, by themselves they are not sufficient. Public health outcomes will not improve unless there is an immediate increase in the availability of healthy food. Simply eliminating Farm Bill subsidies “cannot be viewed as a quick fix for overproduction and low prices” of commodity crops, as it would drive away many farmers and discourage new farmers from entering the field, including the farmers needed to grow the crops that a healthier diet requires.<sup>89</sup> Eliminating subsidies would likely reduce agricultural production in the short-term, causing food prices to rise.<sup>90</sup> Furthermore, farmers have invested in the machinery, training, and farm inputs needed for the production of commodity crops, as a result of decades of Farm Bill

---

87. Wallinga, *supra* note 29, at 407; A. Bryan Endres & Jody M. Endres, *Homeland Security Planning: What Victory Gardens and Fidel Castro Can Teach Us in Preparing for Food Crises in the United States*, 64 FOOD & DRUG L. J. 405, 408 (2009) (noting that “[r]ising food and fuels costs, coupled with dramatic food safety lapses” are pushing policymakers to reconsider the long-term health of an industrial food system that relies on food imported from abroad or shipped long distances domestically); Trexler, *supra* note 3, at 330 (“Some argue that our regulatory agencies will never have enough resources to meet the [food safety] demands of increasing imports.”).

88. Brad Racino, *Flood of Food Imported to U.S., But Only 2 Percent Inspected*, NBCNEWS.COM (Oct. 3, 2011), [http://www.msnbc.msn.com/id/44701433/ns/health-food\\_safety/t/flood-food-imported-us-only-percent-inspected/#.UPMp5uQ0WSo](http://www.msnbc.msn.com/id/44701433/ns/health-food_safety/t/flood-food-imported-us-only-percent-inspected/#.UPMp5uQ0WSo); Andrew Bridges, *Imported Food Rarely Inspected*, USA TODAY (Apr. 16, 2007) [http://www.usatoday.com/news/nation/2007-04-16-imported-food\\_N.htm](http://www.usatoday.com/news/nation/2007-04-16-imported-food_N.htm).

89. Wallinga, *supra* note 29, at 406-07; William S. Eubanks II, *The Sustainable Farm Bill: A Proposal for Permanent Environmental Change*, 39 ENVTL. L. REP. 10493, 10506 (2009) (noting that “the vast subsidy infrastructure currently embedded in the Farm Bill would be difficult to pull out from under the feet of farmers that depend on those subsidies to survive”).

90. See Wallinga, *supra* note 29, at 406-07.

incentives tied to those crops. Simple elimination of those incentives may not result in a quick change in production choices, as path dependence will inevitably lead many farmers to continue producing the same crops to which they have grown accustomed.<sup>91</sup> Though food producers may be incentivized to increase specialty crop production if subsidies were shifted to healthier crops instead of being eliminated, something this author would support, merely removing the current subsidies will not address the oversupply of cheap, unhealthy foods or make healthy foods more readily available, at least in the immediate future.<sup>92</sup> Similarly, other food system reforms, such as taxes and bans, marketing restrictions, or impact litigation will not make healthy foods more available and accessible at once. While they may lead to a series of changes in the food industry over time, turning around the industrial food system quickly may ultimately be impossible; such changes are, therefore, properly viewed as long-range plans, not a rapid path to increase access to healthier foods.

Along the same lines, reform of the industrial food system will not be able to address immediate demand for healthy foods because the U.S. government has not demonstrated the political will to implement food system reforms on the scale that would be necessary to galvanize extensive changes in production. The lack of resolution, particularly at the federal level, has been apparent in various federal actions over the past few years. For example, with regard to subsidy reform, though the 2012 Farm Bill drafts that were put forward in the House and passed in the Senate would have eliminated direct subsidy payments, both versions still maintained support for the same commodity crops via subsidized crop insurance.<sup>93</sup> A similar, example occurred in the context of the Interagency Working Group on Food Marketed to Children, created by Congress in 2009 to address

---

91. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in A Common Law System*, 86 IOWA L. REV. 601, 613 (2001) (describing path dependence that is based on increasing returns and noting that under an increasing returns dynamic, “each step in one direction makes additional steps in that same direction more likely”). Thank you to Daniel Bowman Simon for drawing my attention to the concept of path dependence in this context.

92. See Wallinga, *supra* note 29, at 406-07.

93. See Agriculture Reform, Food and Jobs Act of 2012, S. 3240, 112th Cong. (2012); Federal Agriculture Reform and Risk Management Act of 2012, H.R. 6083, 112th Cong. (2012). But note that no new Farm Bill was passed in 2012, and instead the 2013 fiscal cliff legislation merely continued the 2008 Farm Bill until September 30, 2013 with all of its direct subsidies for the same commodity crops. *Congress Includes Awful 2008 Farm Bill Extension in Fiscal Cliff Deal*, NATL SUSTAINABLE AGRIC. COAL. (Jan. 3, 2013) <http://sustainableagriculture.net/blog/farm-bill-extension-fiscal-cliff/>.



propose restrictions on food marketing.<sup>94</sup> Made up of representatives of the Federal Trade Commission, Centers for Disease Control and Prevention, FDA, and USDA, this working group attempted to create a set of voluntary principles to assist industry self-regulation by “guide[ing] the industry in determining which foods would be appropriate and desirable to market to children to encourage a healthful diet and which foods industry should voluntarily refrain from marketing to children.”<sup>95</sup> These voluntary principles were inherently weak, as such non-binding guidance does not have the force of law. Even so, industry pushed back and the entire process came to an abrupt halt after Congress required the Working Group to conduct a cost-benefit analysis of its voluntary principles.<sup>96</sup>

These examples are two among many recent illustrations of the lack of political will, at least at the federal level, to significantly reform the industrial food system. Yet unless significant new costs are imposed on the industrial food system through the legal regime, the industrial farms that produce commodity crops will not be interested in switching to production of specialty crops. With no sign that the necessary changes to the current system will take place any time soon, the focus must be on investment in an alternative food system that thrives in spite of the current food landscape and supplies the foods needed to improve our public health.

### 3. Supporting the alternative food system is necessary to the goal of making healthy foods more available and affordable

In order to increase consumption of fresh fruits and vegetables, which is central to the goal of obesity reduction, we must increase the availability of fruits and vegetables that ultimately reach the consumer at an affordable price.<sup>97</sup> Studies have shown that people will choose healthier options when they are more readily available<sup>98</sup> and when they are more affordable.<sup>99</sup>

---

94. Omnibus Appropriations Act, 2009 (H.R. 1105, Pub.L. 111-8), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84.

95. *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts, Request for Comments*, INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, 5 (2011), <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf> (citing Omnibus Appropriations Act, 2009 (H.R. 1105, Pub.L. 111-8), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84).

96. Consolidated Appropriations Act of 2012, § 626 (H.R. 2055, Pub. L. 112-74). Note that the Federal Trade Commission released a follow up report in December 2012.

97. Farnese, *supra* note 86, at 398-99.

98. See, e.g., Kimberly Morland, et al., *The Contextual Effect of the Local Food Environment on Residents' Diets: The Atherosclerosis Risk in Communities Study*,

Unfortunately, some discussions about the alternative food system dismiss healthy, local, organic, or sustainable foods as “costly” options that can only meet the needs of middle and upper class consumers.<sup>100</sup> But if we invest in the creation of a viable alternative food system, these foods can be made both more available and more affordable. Such changes can take place more quickly than those made by reforming the industrial food system. In particular, the types of policy changes needed to support the alternative food system may also be more politically feasible than some of the other food system reforms described above. Because for the foreseeable future, the bulk of fruit and vegetable production will continue to take place on small or mid-scale farms, resources should be deployed to reduce costs of production on these farms so that consumer prices of these healthy foods will decrease.

For the reasons illustrated in this section, supporting the alternative food system is equally as vital, if not even more essential, as reforming the industrial food system. Only supporting the alternative system promises to increase access to healthy foods in the short term. Further, supporting the alternative food system can also help us to develop a more sustainable, resilient, and safe food system in the long term.<sup>101</sup> The remainder of this article discusses barriers to the expansion of the alternative food system that produces healthier crops and asserts that the legal profession should play a key role in shaping a legal landscape conducive to healthy food production.

---

92(11) AM. J. OF PUB. HEALTH 1761 (Nov. 2002) (finding that local food environments and food availability impact diet and consumption).

99. See Simone A. French, *Pricing Effects on Food Choices*, 133 J. NUTRITION 841S (2003) (finding that “price reductions are an effective strategy to increase the purchase of more healthful foods in community-based settings such as work sites and schools”).

100. See, e.g., Jerry Hagstrom, *Senators’ Letter Critical of ‘Know Your Farmer’ Program*, AGWEEK, May 17, 2010, <http://www.agweek.com/event/article/id/16388/>; Roger Cohen, *The Organic Fable*, N.Y. TIMES (Sept. 6, 2012) <http://www.nytimes.com/2012/09/07/opinion/roger-cohen-the-organic-fable.html>; Robert Paarlberg, *Attention Whole Foods Shoppers*, FOREIGNPOLICY.COM (May/June 2010), [http://www.foreignpolicy.com/articles/2010/04/26/attention\\_whole\\_foods\\_shoppers?page=0,0](http://www.foreignpolicy.com/articles/2010/04/26/attention_whole_foods_shoppers?page=0,0); Steve Sexton, *The Inefficiency of Local Food*, FREAKONOMICS.COM (Nov. 14, 2011), <http://www.freakonomics.com/2011/11/14/the-inefficiency-of-local-food/>; Mehmet Oz, *Give (Frozen) Peas A Chance—And Carrots Too*, TIME MAG. (Dec. 3, 2012).

101. See Endres & Endres, *supra* note 87, at 408-09.

#### IV. Barriers to the Alternative Food System

Any alternative to our current industrial food system suffers from great disadvantages in terms of financial support, infrastructure, and a legal and policy regime that favors large-scale agribusinesses. For these reasons, as more of our food production has consolidated via the industrial food system, the number of small and medium-sized farms has declined.<sup>102</sup> The farmer population is aging.<sup>103</sup> New farmers are not entering the field fast enough, and a range of barriers stand in the way of their success.<sup>104</sup> Yet we should not forget that farmers are needed to produce healthy foods, and for specialty crop farms to remain viable, they need to have the opportunity to produce real profits.<sup>105</sup>

Barriers to the success of the alternative food system can be broken into three main categories, described below. The first category includes federal and state programs and policies that either fail to support specialty crop production or disadvantage small or mid-size producers by including explicit preferences for large farms and corporations. The second category consists of barriers posed by a legal and regulatory regime that does not utilize risk- or scale-appropriate methods of regulation and thus unfairly penalizes small producers. In addition to these two main categories of barriers to small-scale producers, the third category includes a range of hurdles that acutely impact the mid-size producers that make up what is known as the “agriculture of the middle.” Agriculture of the middle often suffers disproportionately and thus has seen the largest decline in size, despite the promise that this class of producers presents for the creation of a viable alternative food system.

##### *A. Programmatic and Policy Barriers to Small Food Producers*

Federal and state food and agricultural programs currently do not protect or promote specialty crop production or the alternative food system.

---

102. Eubanks II, *supra* note 1, at 228-33.

103. Megan Mills-Novoa, *Sustaining Family Farming Through Mentoring: A Toolkit for National Family Farm Coalition Members*, NAT'L FAMILY FARM COAL. 6-7 (Jan. 2011), available at [http://www.nffc.net/Issues/Local%20Food/NFFC\\_Mentoring\\_Report2011.final.pdf](http://www.nffc.net/Issues/Local%20Food/NFFC_Mentoring_Report2011.final.pdf) (noting that in 1970, the average age of a farmer was 50, but as of 2007, it was 57, with 25 percent of farmers over age 65).

104. Neil D. Hamilton, *Farms, Food, and the Future: Legal Issues and Fifteen Years of the “New Agriculture”*, 26 J. ENVTL. L. & LITIG. 1, 5 (2011) (“The aging farm population, the concentration of land with older owners, [and] transfers to off-farm or often out-of-state heirs,” all present challenges.).

105. Neil D. Hamilton, *America's New Agrarians: Policy Opportunities and Legal Innovations to Support New Farmers*, 22 FORDHAM ENVTL. L. REV. 523, 548 (2011).

As a threshold matter, specialty crop producers certainly do not receive sufficient economic support. Specialty crops received only \$55 million in subsidies in 2012, delivered to states via the Specialty Crop Block Grant Program funded through the Farm Bill.<sup>106</sup> To put that in perspective, USDA spent \$4.9 billion total on farm subsidies in 2011.<sup>107</sup> Unlike the commodity crop subsidies and supports, which are consistent and reliable payments made directly to individual growers by the USDA, Specialty Crop Block Grants are limited to annual allotments to each state and may only go to support a handful of specific crops or specific producers in a state in a given year. Many scholars have argued that instead of eliminating the Farm Bill subsidies completely, Congress should shift a fair portion of these subsidies to farmers implementing sustainable agricultural methods or producing healthier foods.<sup>108</sup> Such a shift will surely be necessary to increase specialty crop production on larger farms because, as noted above, path dependence will encourage commodity crop producers to continue to produce the same crops in the future, unless a countervailing set of incentives encourage them to produce alternatives. But specialty crop supports should also be made available to assist small and mid-size producers in surmounting some of the other barriers that stand in the way of their success, as additional funds could support the creation of new infrastructure and systems to get their food to market. For example, land access, another critical barrier for farmers,<sup>109</sup> could be addressed by increasing access to capital for specialty crop producers.

In addition to the dearth of specialty crop subsidies, specialty crop producers are excluded from other types of key agricultural support programs. Unfortunately, “the traditional system and tools for serving the needs of agriculture, such as Farm Service Agency loans, farm organizations, and extension programs,” are not designed for small or mid-

---

106. *Definition of Specialty Crops*, U.S. DEP’T OF AGRIC., AGRIC. MKTG. SERV., <http://www.ams.usda.gov/AMSV1.0/scbgpdefinitions> (last visited Feb. 16, 2013); *2011 Specialty Crop Block Grants Announced*, NAT’L SUSTAINABLE AGRIC. COAL., <http://sustainableagriculture.net/blog/2011-scbg/> (last visited Feb. 16, 2013); *California Agriculture Leads the Nation in Funding for Specialty Crops*, CAL. DEP’T OF FOOD AND AGRIC. (Oct. 1, 2012), available at [http://www.cdfa.ca.gov/egov/Press\\_Releases/Press\\_Release.asp?PRnum=12-035](http://www.cdfa.ca.gov/egov/Press_Releases/Press_Release.asp?PRnum=12-035).

107. *Farm Subsidy Payments by Program*, ENVTL. WORKING GRP., <http://farm.ewg.org/regiondetail.php?fips=00000&summlevel=2&statename=theUnitedStates> (last visited Feb. 17, 2013).

108. See, e.g., Eubanks II, *supra* note 1, at 298; Melissa D. Mortazavi, *Are Food Subsidies Making Our Kids Fat? Tensions Between the Healthy Hunger-Free Kids Act and the Farm Bill*, 68 WASH. & LEE L. REV. 1699, 1729 (2011); Wallinga, *supra* note 29, at 408.

109. Hamilton, *supra* note 105, at 549.

size emerging farmers.<sup>110</sup> Crop insurance programs that protect farmers from financial ruin when their crop is lost generally do not exist for farms that grow fruits and vegetables or that combine produce and livestock production.<sup>111</sup> This makes little sense, as these types of systems are generally at a lower risk of costly crop failure or losses since they produce a more diverse range of products.<sup>112</sup> Similarly, organic food products, which are mostly specialty crops, require a 5 percent premium on crop insurance expenses, but losses are only paid out at conventional crop prices, despite the fact that organic crops sell for higher prices.<sup>113</sup> In a vicious cycle, the lack of access to comprehensive crop insurance can also reduce access to credit for farmers, because lenders have less reassurance of being paid back on loans.<sup>114</sup>

Small and mid-scale farms and specialty crop producers can also be left out of many price support and incentive programs explicitly as a result of their size. For example, both North Dakota and Pennsylvania provide property tax exemptions or tax reductions for farm property and farmsteads; however, they apply only to farms that are 10 acres or larger.<sup>115</sup> Similarly, the Model Right to Farm Ordinance used by the state of New Jersey defines a “commercial farm” for purposes of right to farm protections as a farm that is larger than 5 acres, or one that produces agricultural products worth \$50,000 or more annually.<sup>116</sup> Only farms meeting these criteria are protected against nuisance litigation from surrounding residents.<sup>117</sup> These definitions exclude urban farms and small

---

110. Hamilton, *supra* note 78, at 129.

111. Susan Prolman, *Federal Food and Agriculture Policy*, TEDxHarvardLaw Conference (Oct. 21, 2011), <http://www.youtube.com/watch?v=W4u-qsxpkZ8>; O'Hara, *supra* note 40, at 3-12, 19.

112. See Joy Harwood et al., *Managing Risk in Farming: Concepts, Research, and Analysis*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., MARKET AND TRADE ECON. DIV. AND RES. ECON. DIV., AER 774, 14-17 (March 1999), available at <https://www.agriskmanagementforum.org/sites/agriskmanagementforum.org/files/Documents/Managing%20Risk%20in%20Farming.pdf>; O'Hara, *supra* note 40, at vi, 3-4 (defining risks as including low prices, supply shocks due to damage from weather, disease, or pests, and other declines in profitability).

113. Prolman, *supra* note 111; O'Hara, *supra* note 40, at 9-11.

114. O'Hara, *supra* note 40, at 12.

115. N.D. CENT. CODE ANN. § 57-02-08 (15)(b) (West 2011) (“‘Farm’ means a single tract or contiguous tracts of agricultural land containing a minimum of ten acres . . . .”); 53 PA. CONS. STAT. ANN. § 8582 (West 2012) (“‘Farmstead.’ All buildings and structures on a farm not less than ten contiguous acres in area”).

116. *State Agriculture Development Committee Model Right to Farm Ordinance*, N.J. DEP'T OF AGRIC., available at <http://www.nj.gov/agriculture/sadc/rtfprogram/resources/modelrtfordinance.pdf> (last visited March 14, 2013).

117. *Id.*

agricultural operations. While these limitations only impact a tiny group of very small farms, these explicit biases against small farms should be systematically identified and removed in order to eliminate the barriers to alternative food producers. Small farmers should be afforded the same benefits as large farmers with respect to farm protections, tax incentives, and other agricultural policies.

In addition to the lack of support described above, the industrial food system also has the advantage of an established infrastructure for storage, processing, and distribution that supports large-scale production of commodity crops. This system, based around “oligopolistic supply chains” and “superstore-based retail interfaces”<sup>118</sup> is not well-suited to small and mid-size producers. In many cases, there are no longer storage, processing, and distribution networks well-suited to the needs of the alternative food system. In the words of Michael Pollan, noted food journalist and author, “the government could help seed a thousand new polyculture farmers in every county in Iowa, but they would promptly fail if the grain elevator remained the only buyer in town and corn and beans were the only crops it would take.”<sup>119</sup>

Even the USDA has acknowledged that small and mid-scale food producers are “challenged by the lack of distribution and processing infrastructure of appropriate scale that would give them wider access to retail, institutional, and commercial foodservice markets.”<sup>120</sup> The federal government, as well as state and local governments, have begun to take interest in this issue by finding ways to support the creation of local or regional “food hubs” that “offer a combination of production, distribution, and marketing services” to these producers, allowing them to access new and larger markets.<sup>121</sup> But logistical challenges still plague these farmers. For example, most institutional purchasers and large-scale food distributors are now accustomed to purchasing through an efficient and effective industrial system in which massive distributors provide a diverse array of products with ease.<sup>122</sup> These purchasers often do not want to work with small or mid-size farmers, which would require them to manage various

---

118. Johnson & Endres, *supra* note 74, at 59-60.

119. Michael Pollan, *Farmer in Chief*, N.Y. TIMES MAG. (Oct. 9, 2008), *available at* [http://www.nytimes.com/2008/10/12/magazine/12policy-t.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2008/10/12/magazine/12policy-t.html?_r=1&pagewanted=all).

120. James Barham et al., *Regional Food Hub Resource Guide*, U.S. DEPT. OF AGRIC., AGRIC. MKTG. SERV., 5 (April 2012), *available at* <http://dx.doi.org/10.9752/MS046.04-2012>.

121. *Id.* at 1.

122. Kelli Sanger and Leslie Zenz, *Farm-to-Cafeteria Connections: Marketing Opportunities for Small Farms in Washington State*, WASH. DEP'T OF AGRIC., 19 (Jan. 2004), *available at* <http://agr.wa.gov/Marketing/SmallFarm/docs/102-FarmToCafeteriaConnections-Web.pdf>.

small deliveries, coordinate with multiple parties, and conduct more preparation on site because small and mid-size producers are more likely to offer raw, unprocessed foods.<sup>123</sup> The lack of infrastructure for aggregating and delivering the products from these alternative food producers is a key reason for the lack of interest among institutional purchasers in buying from this cohort of producers.<sup>124</sup>

This is not to say that there is no support for small or mid-scale alternative food producers. Over the past four years, the USDA has launched the “Know Your Farmer, Know Your Food” initiative as an umbrella for new programs that encourage small and mid-size producers by supporting direct marketing and regional food systems.<sup>125</sup> The 2008 Farm Bill also included new supports for alternative food producers, such as creating a Horticulture and Organic Agriculture title for the first time, dramatically increasing the funding for the Specialty Crop Block Grant Program, augmenting funding for the Farmers Market Promotion Program, establishing a new Office of Small Farms and Beginning Farmers and Ranchers, and launching various grant and loan programs to support beginning farmers and ranchers and small and disadvantaged farmers.<sup>126</sup> The Farm Service Agency’s Microloan Program, launched in early 2013, will provide micro-loans under \$35,000 to small, beginning, and socially-disadvantaged farmers in order to help them get started and then hopefully “graduate” to other commercial credit opportunities.<sup>127</sup> Yet this support still pales in comparison to the \$4.9 billion subsidies provided to

---

123. Emily Broad Leib et al., *Increasing Local Food Procurement by Massachusetts State Colleges & Universities*, HARV. FOOD L. & POL’Y CLINIC, 28 (Oct. 2012), available at <http://blogs.law.harvard.edu/foodpolicyinitiative/files/2011/09/Increasing-Local-Food-Procurement-by-Mass-State-CollegesFINAL2.pdf>; Sanger & Zenz, *supra* note 121, at 21.

124. Gail Feenstra et al., *Using a supply chain analysis to assess the sustainability of farm-to-institution programs*, 1(4) J. OF AGRIC., FOOD SYSTEMS, AND COMM. DEV. 69, 75 (2011) (finding that institutional buyers most frequently considered “reliable delivery, a ready year-round supply, and availability of local produce from their primary vendor” when considering whether to purchase locally grown food).

125. *Know Your Farmer, Know Your Food*, U.S. DEP’T OF AGRIC., <http://www.usda.gov/wps/portal/usda/knowyourfarmer?navid=KNOWYOURFARMER> (last visited Feb. 13, 2013).

126. Renée Johnson, *The 2008 Farm Bill: Major Provisions and Legislative Action*, CONG. RESEARCH SERV., 5-7 (Oct. 3, 2008), [http://assets.opencrs.com/rpts/RL34696\\_20081003.pdf](http://assets.opencrs.com/rpts/RL34696_20081003.pdf); see generally 2008 Food, Conservation, and Energy Act, Pub. L. 110-246.

127. Press Release, U.S. Dept of Agric., Farm Service Agency, USDA Finalizes New Microloan Program, (Jan. 15, 2013) [http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=ner&newstype=newsrel&type=detail&item=nr\\_20130115\\_rel\\_0010.html](http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=ner&newstype=newsrel&type=detail&item=nr_20130115_rel_0010.html).

commodity crops in 2011.<sup>128</sup> If the U.S. wants to ensure that fruits, vegetables, and other healthy foods are available and affordable, “policy makers need to offer at least as much research, financial, and other support to domestic farmers of these crops as has been done for commodity crop growers for decades.”<sup>129</sup> Financial support should also be directed towards incentivizing farmers to move from commodity production to specialty crop or organic crop production.<sup>130</sup>

Some new supports for alternative producers have also emerged at the state and local level. For example, as a method to encourage new farmers, beginning farmers in Nebraska are eligible for: (1) a three-year lease rather than the typical one-year lease; (2) a \$500 tax credit reimbursement for a required financial management course; and (3) a property tax exemption.<sup>131</sup> In 2012, Minnesota enacted a statute making loans available to new farmers with limited financial means to spend on agricultural land or purposes.<sup>132</sup> Similarly, Iowa’s Beginning Farmer Loan Program assists new farmers in purchasing agricultural land<sup>133</sup> and authorizes a range of loan supports and financial assistance to beginning farmers.<sup>134</sup> Despite these small steps in the direction of assisting small producers, new farmers, and specialty crop operations, much more programmatic support is needed in terms of access to capital, insurance protections, and infrastructure investments in order for the alternative food system to be successful.

### *B. Legal and Regulatory Hurdles*

As the industrial food system has grown, the legal and regulatory regime related to the food system—including rules that cover everything from food safety to zoning to tax policy—has also been shaped by massive farms and agribusinesses. Unfortunately, legal systems focused on regulating national or international markets often fail to take account of the interests and needs of smaller actors.<sup>135</sup>

---

128. *Farm Subsidy Payments by Program*, ENVTL. WORKING GRP., <http://farm.ewg.org/regiondetail.php?fips=00000&summlvl=2&statename=theUnitedStates> (last visited Feb. 13, 2013).

129. Wallinga, *supra* note 29, at 408.

130. *Id.*

131. NEB. REV. STAT. §§ 77-5201 to 5209 (2012); *see also Beginning Farmer Programs – tax credit programs*, NEB. DEP’T OF AGRIC., [http://www.agr.ne.gov/beg\\_farmer/taxcpbfr.html](http://www.agr.ne.gov/beg_farmer/taxcpbfr.html) (last visited Feb. 26, 2013).

132. MINN. STAT. ANN. § 41B.01-.23 (West 2012).

133. IOWA CODE ANN. § 175.12 (West 2012).

134. *Id.* at § 175.1-.37.

135. Johnson & Endres, *supra* note 74, at 69.



Embedded within the legal and regulatory regimes that evolved to support industrial food are significant barriers for small and mid-size food producers.<sup>136</sup> According to celebrated polyculture<sup>137</sup> farmer and food movement advocate Joel Salatin, “[e]very time a letter arrives in the mail from a federal or state agriculture department my heart jumps like I just got sent to the principal’s office. And it doesn’t stop with agriculture bureaucrats. It includes all sorts of government agencies, from zoning, to taxing, to food inspectors.”<sup>138</sup> Though our food and agricultural laws are well-suited to governing large enterprises, they fail to achieve a proper balance when it comes to small or mid-size farmers like Salatin, who wish to sell through local or regional supply chains. When these rules are applied to small and mid-size farmers, who cannot afford to meet the regulatory requirements, they are not able to continue their operations or are unable to bear these costs of production and while still selling their products at marketable prices. These rules, written for large-scale businesses, hamper the success of local producers by “forcing them into a paradigm of regulation designed for industrial practices.”<sup>139</sup>

This is particularly so in the realm of food safety regulation. Small or mid-size diversified farms that grow different crops during different growing seasons have to get their crops inspected separately in order to meet quality standards, rather than being able to have one annual inspection like large industrial monoculture farms.<sup>140</sup> Small or mid-size food processors are generally required to meet the same certified kitchen requirements as large-scale commercial food enterprises—including building three separate sinks, ensuring complete separation of the kitchen from any living or sleeping quarters, and utilizing countertops and utensils made of specific materials and free of any cracks or chips.<sup>141</sup>

One particular area where federal food safety laws prevent the growth of the alternative food system is in the realm of meat slaughter and processing. Like many other areas of food safety, meat slaughter laws

---

136. *Id.* at 66.

137. Polyculture is defined as multiple crops and/or livestock produced on a single farm. O’Hara, *supra* note 40, at 4.

138. JOEL SALATIN, *EVERYTHING I WANT TO DO IS ILLEGAL*, (Chelsea Green Pub Co., 2007).

139. Trexler, *supra* note 3, at 339.

140. *Good Agricultural Practices and Good Handling Practices Audit Verification Program User’s Guide*, U.S. DEP’T OF AGRIC., AGRIC. MKTG. SERV., FRUIT AND VEGETABLE PROGRAMS, FRESH PRODUCTS BRANCH, 7- 8 (April 2011), *available at* <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5097151>.

141. FDA Food Code 2009, 4-101.11- 4-202.11, 6-202.112, 6-301- 6-306, *available at* <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode2009/default.htm>.

were created as a means of regulating large operations, whose food products are transported long distances, and who were responsible for massive food-borne illness outbreaks. Small meat slaughterhouses produce products that do not get into the larger food stream and thus are not responsible for large food outbreaks, yet they are penalized by being subject to a set of costly regulations that are impossible for them to afford.

The Federal Meat Inspection Act requires federal inspection of all meat sold in interstate commerce, and federal or equally rigorous state inspection of all meat sold within state borders.<sup>142</sup> These meat inspection laws include exemptions for individuals who raise and “custom” slaughter their own animals for personal or household use by that individual and any nonpaying guests, but they do not contain any exemptions or modifications for small producers selling to the public.<sup>143</sup>

After a severe *E. coli* outbreak in ground beef killed four and sickened nearly 600 individuals across several states,<sup>144</sup> in 1998 the USDA began requiring meat processors to implement Hazard Analysis and Critical Control Point (HACCP) plans.<sup>145</sup> This requirement was extended to small and very small slaughter and processing plants in 2000.<sup>146</sup> Since that time,

142. 21 U.S.C.A. §§ 601-25 and 661 (2012). There are certain situations, however, where meat that is processed in a state-inspected facility can be sold interstate; a new voluntary cooperative interstate shipping program allows the sale in interstate commerce of certain meat products from certain small state-inspected establishments. *Id.* at § 683 ; 9 C.F.R. § 321.3 (2012).

143. 21 U.S.C.A. § 623(a) (2012). Such custom slaughtered meat cannot be sold, must be kept separate from meat processed for sale, and must be clearly labeled “Not for Sale.” *Id.*

144. Dan Flynn, *Ten of the Most Meaningful Outbreaks*, FOOD SAFETY NEWS (Sept. 14, 2009), <http://www.foodsafetynews.com/2009/09/ten-of-the-most-meaningful-food-borne-illness-outbreaks-picked-out-of-so-many/#.UPxAJ-Q0WSo>.

145. David Taylor, *Does One Size Fit All?: Small Farms and U.S. Meat Regulations*, 116(12) ENVTL HEALTH PERSP. A528, A529 (2008) (noting that HACCP plans require that a processor “identifies the points in its operation at which health risks might occur, then takes steps to monitor and contain those risks”); see Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6774 (proposed Feb. 3, 1995) (codified at 9 C.F.R. pts. 308, 310, 318, 320, 325, 326, 327 and 381); Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 61 Fed. Reg. 38,806 (July 25, 1996) (codified at 9 C.F.R. pts. 304, 308, 310, 320, 327, 381, 416 and 417).

146. Small plants with between 10 and 499 employees and very small plants with one to nine employees or annual sales of less than \$2.5 million were given an additional 30 months and 42 months, respectively, to comply with the HACCP requirements. See *Key Facts: Impact of HACCP Rule on Small Business*, U.S. DEP’T OF AGRIC., FOOD SAFETY AND INSPECTION SERV. (July 1996), available at <http://www.fsis.usda.gov/oa/background/keysmaill.htm>; *HACCP Implementation—Phase III for Very Small Plants*, U.S. DEPT OF AGRIC. FOOD SAFETY AND INSPECTION SERV. (July 1999),

the number of small and very small meat slaughter plants has decreased exponentially.<sup>147</sup> The cost of compliance with these federal rules—and the equally rigorous state rules in states that have created state regimes—has created such high barriers to entry that many areas lack federal- or state-inspected meat slaughter and processing plants. Instead, meat must be shipped longer distances, and sometimes even across state lines, for slaughter at an inspected facility, adding considerable transportation costs, which result in higher ultimate prices for consumers.<sup>148</sup> As a result, many farmers hoping to sell locally-raised meat products suffer from a lack of availability of slaughter and processing facilities.<sup>149</sup>

Meat is surely a high risk product, but the risks often increase with the size of the animal production and slaughter operation, and “regional and locally-oriented food supplies, due to their smaller scale, may be better suited to avoid the higher-risks identified in large-batch processing and animal confinement.”<sup>150</sup> This is a market which many farmers would like to enter, and in which there is certainly consumer demand for fresh, high-quality meat free from antibiotics and preservatives,<sup>151</sup> but which remains small and beleaguered as a result of federal law. Some states are starting to identify solutions, such as supporting the creation of mobile slaughterhouses, which are considerably less costly to build and can reach farmers in a broader geographic area, thus allowing the operators to recoup their costs more quickly.<sup>152</sup> But federal laws could also be modified to fit

---

<http://www.fsis.usda.gov/oa/background/phase3.htm>. Small plants are defined as having 10 or more but fewer than 500 employees and very small plants are defined as having fewer than 10 employees or less than \$2.5 million in sales. *Id.*

147. *Where's the Local Beef?*, FOOD AND WATER WATCH, 3 (June 2009), available at <http://documents.foodandwaterwatch.org/doc/WheresTheLocalBeef.pdf> (“Between 1998 and 2007, the total number of inspected slaughter facilities fell by 20.8 percent. More “other” facilities, defined as state-inspected or custom, were lost — 22 percent — than federally-inspected plants — 18 percent.”); Taylor, *supra* note 145, at A530 (noting that “the number of slaughter facilities also shrank by about 10%” in the period from 1981 to 2008).

148. *Where's the Local Beef?*, *supra* note 147.

149. Hamilton, *supra* note 104, at 15.

150. Endres & Endres, *supra* note 87, at 437.

151. See *Where's the Local Beef?*, *supra* note 147 at 12; Taylor, *supra* note 145, at A529; Johnson & Endres, *supra* note 74, at 69. Small producers are also more likely to raise grass-fed beef, which has been found to be healthier than the grain-fed beef raised in most large-scale animal feeding operations. See Cynthia A Daley et al., *A Review of Fatty Acid Profiles and Antioxidant Content in Grass-Fed and Grain-Fed Beef*, 9 NUTRITION J. (2010) (finding health benefits present in grass-fed beef that are not present in grain-fed beef).

152. See, e.g., Vermont Leg., Budget Bill, Act 65 of 2007, Sec. 82(a) (2012); *About IGFC*, ISLAND GROWN FARMERS COOP., <http://www.igfmeats.com/2.html> (last visited

small-scale operations, or could explicitly provide for grants, loans, and other supports that would allow smaller enterprises to join the market by helping to defray the high start-up costs they face to meet the regulatory burdens. Even though the health and safety risks and environmental costs of large-scale confined animal feeding operations (CAFOs) have been widely acknowledged,<sup>153</sup> the current legal structures allow little opportunity to start creating alternatives.

While food safety should be a paramount concern for any food system, food safety laws should not preempt participation of small and mid-size producers, whose operations do not approach the level of risk inherent in larger operations.<sup>154</sup> But because the regulatory burdens on food producers do not increase in proportion to their size, small and mid-size producers are relatively disadvantaged in the marketplace.<sup>155</sup> In some cases, like that of small-scale meat production discussed above, the barriers to entry may be too great for them to participate at all, despite the fact that “small companies generally contribute proportionately less to the problems justifying regulation” in the first place.<sup>156</sup> Local food produced on a smaller scale can often be safer because it usually undergoes less processing, comes into contact with fewer points of contamination, and is fresher.<sup>157</sup> Foods produced on a smaller scale are also less likely to lead to

Feb. 17, 2013). Note that the costs of such units can still be quite high, as they must operate under strict food safety rules, complete costly HACCP plans, and operate under continuous inspection.

153. See, e.g., Mary J. Gilchrist et al., *The Potential Role of Concentrated Animal Feeding Operations in Infectious Disease Epidemics and Antibiotic Resistance*, 115(2) ENVTL. HEALTH PERSP. 313–316 (Feb. 2007); Dick Heederik et al., *Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations*, 115(2) ENVTL. HEALTH PERSP. 298–302 (Feb. 2007); Peter S. Thorne, *Environmental Health Impacts of Concentrated Animal Feeding Operations: Anticipating Hazards—Searching for Solutions*, 115(2) ENVTL. HEALTH PERSP. 296–297 (Feb. 2007); Julie Follmer & Roseann B. Termini, *Whatever Happened to Old Mac Donald’s Farm Concentrated Animal Feeding Operation, Factory Farming and the Safety of the Nation’s Food Supply*, 5 J. FOOD L. & POL’Y 45 (2009).

154. Schneider, *supra* note 6, at 951 (noting that our food safety system should not “discourage small farming operations and regional food processing centers through regulatory structures that are impossible for smaller operations to meet”).

155. James L. Huffman, *The Impact of Regulation on Small and Emerging Businesses*, 4 J. SMALL & EMERGING BUS. L. 307, 313 (2000).

156. *Id.*

157. Trexler, *supra* note 3, at 338 (citing Neil D. Hamilton, *Farmers’ Markets: Rules Regulations and Opportunities*, NAT’L AGRIC. L. CTR., 2 (2002), available at [http://www.nationalaglawcenter.org/assets/articles/Hamilton\\_farmersmarkets.pdf](http://www.nationalaglawcenter.org/assets/articles/Hamilton_farmersmarkets.pdf); see also Laura B. DeLind. & Philip H. Howard, *Safe at any scale? Food scares, food regulation, and scaled alternatives*, 25 AGRIC. & HUMAN VALUES 301 (2008). Note that smaller scale meat production is also much safer for public health if the farm is not

the types of large, multistate food-borne illness outbreaks we have seen in recent years.<sup>158</sup> In light of the reduced risks and smaller operating margins of small and mid-size producers, food safety rules should be both risk- and scale-appropriate, and should make it possible for these small and mid-size food producers to succeed.<sup>159</sup> Reducing these legal barriers will be essential in order for the alternative food system to thrive.

*C. Barriers to Mid-Size Producers and the Agriculture of the Middle*

Many authors have written about the challenges to small producers using direct markets to sell their foods,<sup>160</sup> or have called for a “small producer exceptionalism,” under which regulators would treat small producers differently than industrial food producers.<sup>161</sup> However, in order to build alternatives that can truly improve the food environment, we must focus not only on small farmers that sell solely or primarily through direct marketing outlets (such as farmers markets, farm stands, and community-supported agriculture or CSA models), but also on mid-size farmers who “are the ones best positioned to offer a more diverse set of foods, including fruits and vegetables, to a more local market and have the flexibility to increase production to a larger scale.”<sup>162</sup>

Sometimes referred to as the “agriculture of the middle,” these mid-size producers make up the “disappearing sector of mid-scale farms/ranches and related agrifood enterprises that are unable to successfully market bulk commodities or sell food directly to consumers.”<sup>163</sup> Definitions of “agriculture of the middle” or “mid-size farms” vary, but most scholars agree that the category includes farmers

---

using antibiotics, not polluting the waterways with antibiotics and waste products, and not exposing workers to sick animals, as are the practices at many industrial livestock operations. See note 153 for examples.

158. Trexler, *supra* note 3, at 320-21.

“One infected carcass can contaminate eight tons of ground beef, and a single lot of hamburger was once traced back to six different states and 443 individual animals. . . . The rise of foodborne illness traced to food products never before considered to present a problem, like fruits and vegetables, relates not only to the factory farm, but also to the system of centralized processing.” *Id.*

159. Johnson & Endres, *supra* note 74, at 114.

160. See, e.g., Braaten & Coit, *supra* note 77, at 22-23; Johnson & Endres, *supra* note 74, at 87; *Where’s the Local Beef?*, *supra* note 147; Taylor, *supra* note 145, at A529.

161. Johnson & Endres, *supra* note 74, at 87.

162. Wallinga, *supra* note 29, at 407 (citing Fred Kirschenmann et al., *Why Worry About the Agriculture of the Middle?* AGRIC. OF THE MIDDLE (2004), <http://www.agofthemiddle.org/papers/whitepaper2.pdf>).

163. *What’s This About*, AGRICULTURE OF THE MIDDLE, <http://www.agofthemiddle.org/> (last visited Feb. 19, 2013).

who cultivate between 100-500 acres,<sup>164</sup> make between \$50,000 and \$500,000 in annual sales;<sup>165</sup> and are generally too large to sell primarily or solely through direct marketing to local consumers, but are too small to compete in the industrial food system.<sup>166</sup>

Unfortunately, the agriculture of the middle is vanishing.<sup>167</sup> While both very large farms and very small farms have been increasing in numbers, the number of mid-size farms has been steadily declining.<sup>168</sup> Between 1987 and 1997 there was an “18 percent sales increase in farms that are 1 to 100 acres in size and a 71 percent sales increase in farms that are more than 1000 acres in size,” but “farms in the 260 to 500 acre range averaged a 29 percent decrease in sales.”<sup>169</sup> Yet these mid-size farms and food producers are needed to develop viable and sustainable alternatives to the industrial food system.<sup>170</sup>

The decline of the agriculture of the middle may be because mid-size farmers face some of the largest barriers to market entry. Increased interest in local foods and direct marketing over the past decade helped lead to the creation of a set of legislative and regulatory exemptions for sales made directly from farmer to consumer, especially for low-risk foods. Various federal and state legislation and regulations now “ease[] these barriers by removing regulatory burdens that resulted in unnecessary time, cost, and procedural hurdles for small food producers.”<sup>171</sup> For example, federal food labeling rules exempt small-scale producers who sell their products directly to consumers so long as their profits do not exceed \$500,000 in annual gross sales and the label “bears no nutrition claims or other nutrition

---

164. Kirschenmann et al., *supra* note 70.

165. *Characterizing Ag of the Middle and Values-Based Food Supply Chains*, AGRIC. OF THE MIDDLE (Jan. 2012), <http://www.agofthemiddle.org/archives/2012/01/characterizing.html#more> (defining mid-sized as “too small to be served well by commodity markets and too large to be served well by direct markets” which mainly includes farmers earning \$50,000-\$500,000 in gross sales).

166. G. G.W. Stevenson et al., *Midscale food value chains: An introduction*, 1(4) J. OF AGRIC., FOOD SYSTEMS, AND COMM. DEV., 27, 28 (2011); Kathleen Merrigan, *Beyond Farmers Markets: Why Local Food Belongs on Grocery Shelves*, THE ATLANTIC (Sept. 6, 2012), <http://www.theatlantic.com/national/archive/2012/09/beyond-farmers-markets-why-local-food-belongs-on-grocery-shelves/262064/> (noting that “there is a segment of farmers and ranchers who are too small to compete on the global market, but large enough that the proceeds from a farm stand or weekly farmers market are not going to cut it,” and for whom we must continue to foster the opportunity to access regional markets).

167. *What’s This About*, *supra* note 163.

168. Stevenson et al., *supra* note 166 at 28.

169. Kirschenmann et al., *supra* note 70, at 4.

170. *See id.*

171. Johnson & Endres, *supra* note 74, at 116.

information.”<sup>172</sup> USDA rules also contain inspection exemptions for direct marketing of both eggs<sup>173</sup> and poultry,<sup>174</sup> with certain restrictions. However, both exemptions are generally limited to direct sales, creating barriers to mid-scale producers who are producing healthy alternative foods and wish to sell to a slightly larger market by utilizing intermediaries or selling to larger institutions. Instead, such mid-size producers often must operate in accordance with the costly regulations intended for larger industrial farms and agribusinesses.

One key example of an exemption for small-scale producers that does not extend to mid-size operations occurs at the state level. Balancing food safety concerns with the opportunity to encourage small-scale food producers, more than 40 states have carved out exceptions to food safety laws in order to allow for “cottage food production.”<sup>175</sup> These cottage food laws allow for the sale of non-potentially hazardous foods processed in home kitchens—items like baked goods, jams, and jellies—either without the producer needing to obtain a permit or at least without undergoing the traditional, costly permitting requirements. However, most state cottage food rules impose annual sales caps ranging from \$5,000 to \$35,000, which precludes mid-size producers, who generally produce enough to support \$50,000 to \$500,000 worth of sales.<sup>176</sup> Further, states generally require cottage foods to be sold only through direct marketing channels, effectively barring mid-scale operations, which produce too much to sell only through direct-to-consumer sales. In addition, many cottage food laws include burdensome regulations that pose barriers to mid-size operations, or to small producers that are aiming to grow to become mid-size operations. Such hurdles include limitations on the venues in which these foods can be

---

172. 21 C.F.R. § 101.9(j) (2012).

173. 7 C.F.R. § 57.100 (2012).

174. 9 C.F.R. § 381.10 (2012).

175. Emily Broad et al., *Legislative and Regulatory Recommendations to Allow Home-Processing of Low-Risk Foods in Mississippi*, HARVARD HEALTH LAW & POLICY CLINIC, 6 (2010), available at <http://blogs.law.harvard.edu/foodpolicyinitiative/files/2011/09/In-Home-Food-Safety-FORMATTED.pdf>; additional updated research on file with the author.

176. See, e.g., MINN. STAT. ANN. § 28A.15(9)-(10) (2012) (capping annual sales at \$5,000); MICH. COMP. LAWS § 289.4102 (2012) (capping annual sales at \$20,000 until Dec. 31, 2017, then raising the cap to \$25,000 in annual sales); CAL. HEALTH & SAFETY CODE § 113758(a) (2012) (allowing for annual increases in the earnings cap, starting with \$35,000 in 2013, \$45,000 in 2014, and capping out at \$50,000 in 2015. See also TENN. COMP. R. & REGS. 0080-04-11-.03 (2012) (which includes a cap on the number of units of home-processed products that may be sold, rather than an income limit).

sold;<sup>177</sup> limitations on the types of food items that can be produced in a home kitchen;<sup>178</sup> restrictive labeling requirements that may be expensive to implement;<sup>179</sup> and permitting requirements that are arduous and costly to meet.<sup>180</sup>

Mid-scale producers suffer from being treated like industrial food system operations in other ways as well. As an example, farmers and food producers selling directly to consumers do not need to undergo any food safety or food quality inspections, but mid-size operations aiming to sell via intermediaries like aggregators or distributors, or to institutional purchasers such as K-12 schools, colleges, and state agencies, are often forced to undergo food quality inspections. The most prevalent such inspection program is the Good Agricultural Practices (GAP)/Good Handling Practices (GHP) certification, developed by the USDA.<sup>181</sup> While GAP and GHP are voluntary and not required by federal or state law, many large purchasers will not accept food from farms that have not been certified. Certification can be an extremely costly process. At baseline, the annual certification audit costs an administrative fee of \$50, plus \$92/hour, including travel time, for the audit.<sup>182</sup> In addition, farms often must make significant additional investments, like installing fencing or toilets, in order to meet the audit criteria.<sup>183</sup> According to one source, total costs can range from \$500 to \$1,500 (and up to \$8,500 in some cases).<sup>184</sup> Also, if a farmer

177. See, e.g., ALA. ADMIN. CODE r. 420-3-22-.01(4)(a)(11) (2012); IND. CODE ANN. § 16-42-5-29 (2012); S.D. Codified Laws § 34-18-35 (2012); MICH. COMP. LAWS § 289.4102 (2012).

178. For example, some states utilize a restrictive list of products allowed to be produced as cottage foods, rather than allowing in-home production of all non-potentially hazardous foods. See, e.g., OHIO ADMIN. CODE § 901:3-20-04 (2012); TENN. CODE ANN. § 53-8-117 (2012).

179. See, e.g., TENN. COMP. R. & REGS. 0080-04-11-.07 (2012); MD. HEALTH GEN. § 21-330.1(c)(2) (2012).

180. See, e.g., R.I. GEN. LAWS § 21-27-6.1 (2012); TENN. COMP. R. & REGS. 0080-04-11-.04 to .06 (2012); WASH. REV. CODE ANN. § 69.22.030 (2012).

181. *Fresh Fruit and Vegetable Audit Programs*, U.S. DEP'T OF AGRIC., AGRIC. MARKETING SERVICE, [http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=GAPGHPAuditVerificationProgram#P25\\_1498](http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=GAPGHPAuditVerificationProgram#P25_1498) (last visited Feb. 21, 2013).

182. *Good Agricultural Practices (GAP) and Good Handling Practices (GHP) Audit Programs*, CONN. DEP'T OF AGRIC., <http://www.ct.gov/doag/cwp/view.asp?a=3243&Q=465924&PM=1> (last visited Feb. 21, 2013).

183. To see all of the requirements for GAP/GHP certification, visit: *Good Agricultural Practices Good Handling Practices Audit Verification Checklist*, U.S. DEP'T OF AGRIC., (Jan. 2012), <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5091326>.

184. Johnson & Endres, *supra* note 74, at 85-86.



grows different crops at various times of year, they must be audited when each of those crops are grown, meaning that they must undergo multiple audits per year, further adding to the cost.<sup>185</sup> Because small and mid-size specialty crop producers generally produce a more diverse set of products, they are saddled with these additional certifications and must bear higher costs.

Even though GAP and GHP are not mandatory, they are so widely required that they operate as a set of federally-condoned restrictions on small or mid-size diverse, alternative food producers. The federal government supports this certification program in spite of its negative impacts on alternative food producers, yet it provides no reduction in cost or any assistance to small or mid-size farms. Fortunately, some states have implemented programs to decrease the barriers to quality certification. Massachusetts has developed a state auditing program called "Commonwealth Quality" that is less costly and serves as an alternative to the federal program.<sup>186</sup> Other states have worked to aid their small and mid-size farms by creating cost-share programs in which the state assists in covering a portion of the costs associated with first-time certification.<sup>187</sup> But despite these efforts, GAP and GHP certification persists as a barrier to small and mid-size specialty crop producers, particularly impacting those small operations that would like to expand and become mid-size operations, because they are the ones most frequently forced to undergo the inspections.

Luckily, some recent laws that exempt smaller-scale producers from costly regulations have included exemptions large enough to benefit mid-size operations as well. The federal Food Safety Modernization Act (FSMA)<sup>188</sup> created small producer exemptions from its requirements, but these exemptions include a sales cap high enough and marketing restrictions lenient enough to also serve the needs of mid-size producers. The FSMA imposes significant new restrictions on large farms and food

---

185. USDA GAP & GHP Audit Program Information, Univ. of Vt. Extension 1, <http://www.uvm.edu/vtvegandberry/GAPS/Audit%20Program%20Information%20-%20VT.pdf> (last visited Feb. 21, 2013); Phil Tocco, *Are You Ready for a GAP Audit?*, MICH. STATE UNIV. EXTENSION NEWS (May 25, 2011), [http://msue.anr.msu.edu/news/are\\_you\\_ready\\_for\\_a\\_gap\\_audit](http://msue.anr.msu.edu/news/are_you_ready_for_a_gap_audit).

186. *Commonwealth Quality*, MASS. DEP'T OF AGRIC. RES., <http://www.mass.gov/agr/cqp/> (last visited Feb. 21, 2013).

187. See, e.g., *Good Handling Practices and Good Agricultural Practices (GHP/GAP)*, ARIZ. DEP'T OF AGRIC., <http://www.azda.gov/ACT/ghpgap.htm> (last visited Feb. 21, 2013) (reimbursements will cover up to 75 percent of costs associated with one successful GHP/GAP audit, up to a maximum of \$750).

188. Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011), codified at 21 U.S.C. §§ 2201-2252.

processors, authorizing the FDA to develop safety standards for the production of fruits and vegetables for the first time and newly requiring food packing and processing facilities to develop HACCP plans.<sup>189</sup> After a fierce debate on the subject, advocates were successful in winning some exemptions from the produce safety standards mandated for larger operations for agricultural producers whose operations bring in less than \$500,000 annually and who sell a majority (50 percent or more) of their products directly to consumers, restaurants, or retail stores, either within the state or within 275 miles of the farm.<sup>190</sup> In addition to this complete exemption for small and mid-size farmers, small and mid-scale packing and processing facilities (those who meet the same criteria in terms of sales) are exempt from the full HACCP requirements laid out in the statute, and instead may utilize modified hazard control plans.<sup>191</sup> This is a promising development in terms of creating more scale-appropriate regulation for small and mid-size farms, particularly because the \$500,000 cap and clause requiring 50 percent of sales to be through direct marketing channels open up the opportunity for mid-size operations to sell through intermediaries and into larger regional markets, while still being protected by the exemptions.

Another positive development was included in the 2008 Farm Bill, which created new programs specifically for the benefit of mid-size food operations. One example is a 10 percent set aside for “midtier food chains” in USDA’s Value-Added Producer Grant program,<sup>192</sup> which provides grants to producers to generate processed or “value-added” products.<sup>193</sup> Recent federal support for food hubs as methods of creating new infrastructure for regional food systems, mentioned briefly above, will also primarily benefit mid-size farms.<sup>194</sup>

Despite these signs of progress, the challenge remains: in order to create alternatives to the current food system we will need to craft regulations and food safety rules that are risk- and scale-appropriate for both small, direct-marketing operations and mid-size, regionally-focused

189. 21 U.S.C.A. §§ 223(d)(1), 350g, 350h, 350l (2012); *Food Safety Legislation Key Facts*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/downloads/Food/FoodSafety/FSMA/UCM263777.pdf> (last updated July 12, 2011).

190. 21 U.S.C.A. §§ 350h(f)(1), (4) (2012).

191. *Id.* at § 350g(l).

192. 2008 Food, Conservation, and Energy Act, Pub. L. 110-246 § 6202(b)(7)(c)(ii), codified at 7 U.S.C.A. § 1632a (b)(7)(C)(2).

193. *Press Release: Agriculture Deputy Secretary Merrigan Announces Funding To Create Jobs and Strengthen the Economic Foundation of Rural America*, U.S. DEP’T OF AGRIC. (Feb. 3, 2012), <http://usda.gov/wps/portal/usda/usdahome?contentid=2012/02/0040.xml&contentidonly=true>.

194. *See supra* note 120 - 1211 and accompanying text.

enterprises. Unless we remove the barriers standing in the way of alternative producers, healthy foods will remain unavailable and unaffordable, and we will continue to suffer from poor health outcomes. Accordingly, the time and money spent on bolstering the alternative food system should also be viewed as essential investments in improving our nation's public health. Because many of the barriers to the alternative food system are related to legal and policy choices, lawyers in particular can play an essential role in remodeling the system of food and agricultural law and decreasing these barriers. Part IV describes how this can be done.

#### V. The Role for Lawyers in Supporting the Alternative Food System

As we work to support an alternative food system capable of providing the healthy foods that Americans need to consume, actors from many disciplines will be essential.<sup>195</sup> Scientists, economists, doctors, public health experts, and especially farmers, food producers, and food entrepreneurs and innovators will need to help the food system evolve so that healthy foods will become more available and affordable. Farm mentorship organizations are needed to link young and aging farmers so that beginning farmers can gain the skills needed to produce our nation's food supply.<sup>196</sup> Educators are needed to provide nutrition education and culturally-relevant cooking and food preparation classes to consumers so that they will choose to purchase healthy foods if they are available and affordable.<sup>197</sup>

Among this array of different actors, lawyers and the legal profession have an essential role to play in supporting the alternative food system and thereby helping to improve the public health of the nation. As described above, small and mid-size producers suffer acutely from a range of programmatic and policy barriers and legal and regulatory hurdles because they generally are not able to afford the legal expertise needed to help them to learn how to structure their businesses or get the proper permits.<sup>198</sup>

---

195. Wallinga, *supra* note 29, at 408.

"A successful redesign of the food environment will likely require a long-term commitment to mutually supportive interventions, at multiple levels (local, state, and federal) from farm to plate, to effect change in food availability, relative prices, and marketing, complemented by nutrition education." *Id.*

196. Mills-Novoa, *supra* note 103.

197. Shelia L. Broyles et al., *Cultural Adaptation of a Nutrition Education Curriculum for Latino Families to Promote Acceptance*, 43 J. NUTR. EDUC. BEHAV. S158-61 (2011) (describing why cultural relevance in nutrition education is important for efficacy).

198. Johnson & Endres, *supra* note 73, at 66. See also *supra* Section III(A) and accompanying text.

Indeed, they certainly cannot afford to pay for the services of lobbyists who can help them change the laws that are obstacles to their enterprises. Some change is already afoot, as exemplified by the treatment of small and mid-size operations in the Food Safety Modernization Act. But more work is needed. Attorneys can play key roles in supporting the alternative food system by providing legal assistance and counsel to small and mid-size food producers and advocating for policy changes that would lessen the barriers to the alternative food system. Despite recent interest in these important issues from law schools<sup>199</sup> and legal and policy organizations,<sup>200</sup> there is much more for attorneys to do to support the success of a viable alternative food system.

*A. Provide Legal Assistance to Alternative Food System Producers*

The rise of the industrial food system has led to the development of a complex and comprehensive body of law aimed at large-scale producers, discussed in detail above. Legal challenges pose immense barriers to small and mid-size producers, who lack the resources to conduct legal research or retain counsel.<sup>201</sup> In instances where the laws are unclear, some small and mid-size producers may decide to forego even legal production or sales methods for fear of inadvertently breaking the law. Basic legal assistance can go a long way towards providing these producers with the requisite tools. The types of services needed could include drafting and analyzing contracts and leases, preparing wills and estate planning documents, and helping to create agricultural easements to protect farmland. Some organizations and entities are stepping in to fill this void. For example, Farm Commons, based in Madison, WI, provides legal advice to small farmers to facilitate negotiation of leases, create CSA programs, form

---

199. UNIVERSITY OF ARKANSAS SCHOOL OF LAW, LL.M. PROGRAM IN AGRICULTURAL AND FOOD LAW, <http://law.uark.edu/academics/llm/> (last visited Feb. 17, 2013); HARVARD LAW SCHOOL, HARVARD FOOD LAW AND POLICY CLINIC, <http://blogs.law.harvard.edu/foodpolicyinitiative/> (last visited Feb. 17, 2013); CENTER FOR AGRICULTURE AND FOOD SYSTEMS, VERMONT LAW SCHOOL, [http://www.vermontlaw.edu/Academics/Environmental\\_Law\\_Center/Institutes\\_and\\_Initiatives/Center\\_for\\_Agriculture\\_and\\_Food\\_Systems.htm](http://www.vermontlaw.edu/Academics/Environmental_Law_Center/Institutes_and_Initiatives/Center_for_Agriculture_and_Food_Systems.htm) (last visited Feb. 17, 2013); Jay A. Mitchell, *Getting into the Field*, 7 J. FOOD L. & POL'Y 69, 73 (2011).

200. See, e.g., NATIONAL AGRICULTURAL LAW CENTER, <http://www.Nationalaglawcenter.org/> (last visited Feb. 17, 2013); NATIONAL SUSTAINABLE AGRICULTURE COALITION, <http://sustainableagriculture.net/about-us/> (last visited Feb. 17, 2013); THE FOOD TRUST, <http://www.thefoodtrust.org/> (last visited Feb. 17, 2013); FARM COMMONS, <http://farmcommons.org> (last visited Feb. 17, 2013).

201. See, e.g., Johnson & Endres, *supra* note 74, at 86.

business entities, and help plan for farm succession.<sup>202</sup> Law for Food helps farmers and food producers in New England with a range of legal and business services, including entity formation, estate planning and farm transfer planning, and even trademark and trade secret protection.<sup>203</sup> Though these organizations can only offer small-scale responses to the legal needs of alternative food producers, both programs are relatively new, and their emergence points to a positive trend towards attorneys forming such entities that can address the needs of the alternative food system.

Attorneys can also help farmers and small food producers think through potential risks inherent in their products and business practices to make sure they are appropriately insured or indemnified. They can assist food producers in understanding the state food processing and cottage food rules, to ensure that these entrepreneurs are able to bring their products to market without incurring unnecessary costs. Lawyers can also play a role in helping food producers navigate the tax policies that apply to farms, ranging from sales tax to estate tax, ensuring that small farmers realize the tax benefits and incentives for which they are eligible. To this end, North Carolina State University Cooperative Extension regularly holds workshops regarding several different tax issues for farmers.<sup>204</sup>

Another key way in which the legal profession can support the alternative food system is by preparing and hosting trainings on some of the above-mentioned legal issues. According to one study, “too many small producers do not know enough about the rules surrounding their small farm businesses,”<sup>205</sup> which affords great opportunity for attorneys to assist in training farmers and food entrepreneurs about the legal regime. One group working to meet this need is the Farmers’ Legal Action Group (FLAG), established in 1986, which has provided a range of support and advocacy assistance to family farmers for over two decades, including providing over 600 legal trainings and publishing books and manuals on a range of topics.<sup>206</sup> An attorney can use the experience of helping a farmers market to incorporate as a 501(c)(3) or meet state food safety rules to develop trainings and conduct outreach to assist other farmers markets with

---

202. *What Does Farm Commons Do*, FARM COMMONS, <http://farmcommons.org/what-does-farm-commons-do/> (last visited Feb. 17, 2013).

203. *Legal & Business Counsel*, LAW FOR FOOD, [http://www.lawforfood.com/Law\\_for\\_Food/Services.html](http://www.lawforfood.com/Law_for_Food/Services.html) (last visited Feb. 17, 2013).

204. *Enhancing Sustainability Workshops*, CHATHAM CTY. CENTER OF N.C. COOP. EXTENSION, <http://chatham.ces.ncsu.edu/growing-small-farms/workshops.html> (last visited Feb. 17, 2013).

205. Johnson & Endres, *supra* note 74, at 106.

206. *About FLAG*, FARMERS’ LEGAL ACTION GRP., <http://www.flaginc.org/topics/about/index.php> (last visited Feb. 18, 2013).

these issues. This type of assistance will help new specialty crop producers enter the field and will contribute to the success of the alternative food system and the increased availability of fresh, healthy foods.

*B. Advocate for Policy Change to Reduce Barriers to Small Food Producers*

In addition to serving as legal counsel or providing legal trainings, attorneys can identify and support policy changes to remove the barriers to small and mid-size food producers described herein, thus improving the legal and regulatory climate for the alternative food system. Attorneys can help to support the creation of a “new agricultural law,” which would include “laws and policies that promote an agricultural sector that produces healthy food in a sustainable manner.”<sup>207</sup> Laws at the federal, state, and local level all play a role in creating barriers to alternative food production, so laws at each level require reforms to create a legal and policy setting that can increase the supply of healthy foods. Attorneys can help push for increased access to capital, land, insurance protection, and other types of support for specialty crop production at the federal and state level. They can champion modifications to the rules for small-scale meat slaughter and processing, or fight for financial assistance for small slaughterhouses.

Once legislation is passed, attorneys can assist with proper implementation of the reforms. They can educate farmers and food producers about new laws, ensuring that these new laws are effectively implemented on the ground. Lawyers can help farmers and food entrepreneurs identify new opportunities for innovation available in a new legal landscape. When zoning codes are amended to allow more types of urban agriculture, attorneys can educate potential urban farmers about the avenues for expansion. After states create cottage food exemptions, lawyers should alert communities that cottage food entrepreneurs no longer need to go through an onerous permitting process. The legal profession also has a role to play in ensuring that legislation is effectively implemented through the supporting regulations and enforcement. For example, as the Food Safety Modernization Act is implemented, lawyers should work to protect the hard-won exemptions for small and mid-size farmers and food facilities, vigilantly monitoring implementation of the law in order to retain these protections for the alternative food system. These tasks and many more are crucial to the success of the alternative food system and thus to increasing the availability of healthy, fresh foods.

---

207. Schneider, *supra* note 6, at 947.

## VI. Conclusion

The unhealthy industrial food system is at the root of today's epidemics of obesity and diet-related disease. A variety of methods have been suggested to help improve the food and agricultural system in order to make healthy foods more available and affordable, and reduce the flood of cheap unhealthy foods. However, until now, not enough energy has been devoted to programs that would support increased production of specialty crops. In particular, since most specialty crop production takes place on small and mid-size farms, resources must be spent paving the way for these alternative food producers to find success. Because so many of the barriers are related to the legal and regulatory regime governing the food system, or are linked with federal, state, and local policies that disadvantage small and mid-size specialty crop producers, the legal profession has a key role to play in helping alternative food producers thrive as well as in advocating for policy changes to improve the climate for their success.

Deployment of financial and legal resources to bolster the alternative food system is essential because investments in the alternative food system are also investments in our nation's public health. As noted by other scholars, investments in the alternative food system can also lead to rewards in other key areas, such as increasing environmental sustainability, improving food safety outcomes, and growing new opportunities for local economic development.<sup>208</sup> But food system reform is perhaps most urgently needed to compensate for the short-term deficit in the supply of healthy fruits and vegetables required to reverse the course of the obesity epidemic. In order to transform our food system and improve our public health outcomes, we will no doubt need to heed the calls of those who are pushing for reform of some of the worst offenses in the industrial food system so that we can become a healthier society. But in order to provide enough affordable, healthy food to meet the needs of an American public that wants to eat better, we must also lessen the barriers to the alternative food system and make it possible for small and mid-size specialty crop producers to grow America's harvest.

---

208. See, e.g., Schneider, *supra* note 6, at 953-54 (noting that "the significant distance between food production and food consumption that marks our current food system contributes to problems for the environment, the loss of nutrients to consumers, and a disconnect between consumers and producers").

# THE U.S. DEPARTMENT OF AGRICULTURE AS A PUBLIC HEALTH AGENCY? A “HEALTH IN ALL POLICIES” CASE STUDY

*Lindsay F. Wiley\**

I. Introduction.....	61
II. Health in All Policies and the Evolving Public Health Response to Obesity.....	64
III. USDA’s Role in Shaping the Food System.....	69
A. <i>Dietary Guidelines</i> .....	70
B. <i>Agricultural Subsidies and Commodity Market Deregulation</i> .....	75
C. <i>Nutrition Assistance Programs</i> .....	82
D. <i>Scholl Meal Programs</i> .....	91
IV. Conclusion: Toward the Further Development of the Health in All Policies Principle.....	96

## I. Introduction

The “war on obesity” is now well into its second decade.<sup>1</sup> What began as an effort to encourage medical doctors to screen and treat patients whose weight put them at risk for health problems<sup>2</sup> has transformed into a much broader public health campaign to address the root causes of obesity. A growing number of state, territorial and local health departments are currently exploring new ways to promote healthy eating and physical activity.<sup>3</sup> At the federal level, the U.S. Centers for Disease Control and

---

\* Lindsay F. Wiley is an Assistant Professor of Law and Faculty Director of the Health Law & Justice Program at American University Washington College of Law. Many thanks are owed to Nick Masero and Lauren Nussbaum for their invaluable research assistance and to Dean Claudio Grossman for his unflagging support of junior faculty scholarship.

1. *Former Surgeon General Wages War on Obesity*, CNN.COM \*Oct. 29, 1996), [http://articles.cnn.com/1996-10-29/health/9610\\_29\\_nfm\\_obesity\\_1\\_guidelines-bmi-obesity-new?\\_s=PM:HEALTH](http://articles.cnn.com/1996-10-29/health/9610_29_nfm_obesity_1_guidelines-bmi-obesity-new?_s=PM:HEALTH).

2. *See id.*

3. *See* Jennifer L. Pomeranz, *The Unique Authority of State and Local Health Departments to Address Obesity*, 101 AM. J. PUB. HEALTH 1192, 1192-93 (2011).



Prevention (CDC) has made “nutrition, physical activity and obesity” a top priority.<sup>4</sup>

Ultimately, however, a non-health agency has primary authority over what is arguably the most important modifiable determinant of obesity in the United States. The U.S. Department of Agriculture (USDA) plays an enormously important role in shaping our nation’s food system—the food that’s available in stores, restaurants, schools, workplaces, and our homes; how it is produced and sold; how it is consumed and by whom.<sup>5</sup> And in turn, that food system is crucial to public health—how long people live and how healthy they are, not just as a matter of individual medical treatment but as a matter of population-level causes, patterns, and disparities among and between social and economic groups.<sup>6</sup>

Historically, USDA has principally served the interests of the food and agriculture industries. This is not just a matter of agency capture;<sup>7</sup> as public health advocates have pointed out, the U.S. Secretary of Agriculture’s statutory mandate includes “duties to foster ‘new or expanded markets’ and move ‘larger quantities of agricultural products through the private marketing system to consumers.’”<sup>8</sup> Noting that “[w]hile health officials wage a costly war on obesity and diabetes, taxpayers are subsidizing foods that make us fatter,”<sup>9</sup> a growing coalition of advocates

---

4. *Winnable Battles: Nutrition, Physical Activity, and Obesity*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/WinnableBattles/Obesity/index.html> (last updated Aug. 7, 2012).

5. See generally BRUCE W. MARION, *THE ORGANIZATION AND PERFORMANCE OF THE U.S. FOOD SYSTEM* (1986).

6. See generally David Kindig & Greg Stoddart, *What is Population Health?*, 93 AM. J. PUB. HEALTH 380 (2003); Mary Story et al., *Creating Healthy Food and Eating Environments: Policy and Environmental Approaches*, 29 ANNUAL REV. OF PUB. HEALTH 253 (2008).

7. For allegations that the USDA has been captured by agribusiness interests, see, e.g., Philip Mattera, *USDA Inc.: How Agribusiness Has Hijacked Regulatory Policy at the U.S. Department of Agriculture*, FOOD & WATER WATCH, July 23, 2004, available at <http://documents.foodandwaterwatch.org/doc/USDAInc.pdf>.

8. Ron Zimmerman, *Lawsuit Says New Dietary Guidelines are Deceptive*, HEARTWIRE (Mar. 10, 2011), <http://www.theheart.org/article/1197321/print.do>. The quoted language is from 7 U.S.C. §1622(e)(1) (“The Secretary of Agriculture is directed and authorized . . . [t]o foster and assist in the development of new or expanded markets (domestic and foreign) and new and expanded uses and in the moving of larger quantities of agricultural products through the private marketing system to consumers in the United States and abroad.”).

9. *For a Healthier Country, Overhaul Farm Subsidies*, SCIENTIFIC AMERICAN (Apr. 19, 2012) <http://www.scientificamerican.com/article.cfm?id=fresh-fruit-hold-the-insulin>.

and commentators have pressured Congress and USDA to reform federal nutrition and agriculture programs in light of public health goals.

This Article investigates the extent to which USDA-administered programs—including dietary guidelines, agricultural subsidies, nutrition assistance, and school meal subsidies—have been (and are being) shaped by cross-sector advocacy. I situate this investigation within a broader global movement to recognize the importance of “Health in All Policies.” Health in All Policies (HiAP) is “a collaborative approach to improve health by incorporating health considerations into decision making in all sectors and policy areas.”<sup>10</sup> It recognizes that “[e]nvironments in which people live, work, study, and play impact health by influencing available opportunities” and that “[p]olicy decisions made by ‘non-health’ agencies play a major role in shaping [those] environments.”<sup>11</sup>

Increasing collaboration among governmental actors and non-governmental advocacy groups concerned with public health, food policy, poverty, environmental, and agricultural issues in the context of USDA reform provides a useful case study for examining the Health in All Policies principle in action. This Article’s discussion of public health-focused USDA reform seeks to demonstrate that the HiAP approach requires coordinated advocacy and coalition building to exert pressure on the legislative and executive branches of government. I argue that this external pressure should be aimed at producing substantive mandates from the legislature to administrative agencies in “non-health” sectors, rather than simply imposing procedural requirements that health impacts be taken into account in the work of those agencies.

Part II introduces the Health in All Policies principle as the part of the evolving public health response to obesity-related diseases and the expanding scope of public health law. It also raises the concern that the Health in All Policies approach might be in danger of conflation with a particular procedural tool known as Health Impact Assessments. Part III describes the role of USDA-administered programs in shaping the American food system through dietary guidelines, agricultural subsidies, nutrition assistance programs, and school meal subsidies with an emphasis on the role that public interest groups have played in the evolution of these programs. Part IV points to lessons from the evolution of USDA programs for the development of the Health in All Policies principle.

---

10. CALIFORNIA HEALTH IN ALL POLICIES FACT SHEET (2010), *available at* [http://www.sgc.ca.gov/hiap/docs/about/background/HiAP\\_fact\\_sheet.pdf](http://www.sgc.ca.gov/hiap/docs/about/background/HiAP_fact_sheet.pdf); *see also* Adelaide Statement on Health in All Policies, WORLD HEALTH ORGANIZATION (WHO) (2010), *available at* [http://www.who.int/social\\_determinants/hiap\\_statement\\_who\\_sa\\_final.pdf](http://www.who.int/social_determinants/hiap_statement_who_sa_final.pdf) [hereinafter Adelaide Statement].

11. *Id.*

## II. Health in All Policies and the Evolving Public Health Response to Obesity

Until very recently, unhealthy eating habits were almost exclusively viewed as a matter of individual choice. The early years of the war on obesity were heavily influenced by the behavioral model of public health, which emphasized the importance of individual behavior choices (about diet, exercise, smoking, drug and alcohol use, etc.) as the root causes of so-called “lifestyle diseases.”<sup>12</sup> Obesity and chronic disease prevention strategies developed in the 1980s and 1990s relied almost exclusively on public education campaigns and doctor-patient counseling.<sup>13</sup> USDA and the U.S. Department of Health and Human Services (DHHS) rather mildly encouraged consumers to make healthier choices by promoting dietary guidelines that “focused on individuals and tended to state the obvious.”<sup>14</sup> Clinical practice guidelines emphasized the importance of screening and counseling patients based on their body mass index (BMI).<sup>15</sup>

Over time, public concern about the social impacts of unhealthy eating habits has led to a growing role for government regulation based on the newer ecological model of public health.<sup>16</sup> Research establishing that the prevalence of obesity rose sharply during the late 1980s and 90s<sup>17</sup> (a

---

12. See Lindsay F. Wiley, *Rethinking the New Public Health*, 67 WASH. & LEE L. REV. 207, 219-221 (2012) (describing the rise of the behavioral model of health).

13. *Id.*

14. See Marion Nestle & Michael F. Jacobson, *Halting the Obesity Epidemic: A Public Health Policy Approach*, 115 PUB. HEALTH REPORTS 12, 14 (2000).

15. See, e.g., U.S. Preventive Serv. Task Force, Dep’t of Health & Human Serv., *Guide to Clinical Preventative Services: Report of the U.S. Preventative Serv. task Force, Introduction iv: Patient Education and Counseling For Prevention* (2d ed. 1996), available at <http://www.ncbi.nlm.nih.gov/books/NBK15467/>. BMI is a measure used by doctors and researchers to estimate body fat and gauge risk of developing diseases associated with high levels of body fat. CDC, CDC VITAL SIGNS: ADULT OBESITY 2 (2011). An individual’s BMI is derived by dividing her weight in kilograms by her height in meters squared. *Id.* For adults, a BMI between 25 and 30 is categorized as overweight, and a BMI above 30 is categorized as obese. *Id.* Obesity is defined differently for children and teens between the ages of two and twenty. Children and teens whose BMI puts them in the 95th percentile for age and sex are classified as obese. CDC, 2000 CDC Growth Charts for the United States: Methods and Developments, 11 VITAL AND HEALTH STATISTICS 246, available at <http://www.cdc.gov/growthcharts/2000growthchart-us.pdf>. Those between the 85th and 95th percentile are classified as overweight. *Id.* The BMI cut-offs for these percentiles are derived from standardized charts developed by the CDC. *Id.*

16. See Wiley, *supra* note 12 at 221-25 (discussing the shift from the behavioral model to the ecological model).

17. See Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among US Adults: 1999-2008*, 303 J. AM. MED. ASS’N 235 (2010) (finding that the prevalence of

time when “healthy lifestyle” education campaigns were fairly ubiquitous) has prompted policymakers to begin exploring new approaches to fighting the obesity epidemic by reshaping the environments in which individual choices are made.

At the individual level, the causes of obesity are seemingly straightforward: calories in and calories out. But the food a person eats and her level of physical activity are influenced in complex ways by a wide range of social, economic, and environmental determinants.<sup>18</sup> For the most part, our current environment is stacked against healthy eating and physical activity. Researchers characterize our social, food, information, and built environments as “obesigenic,” meaning that “if you go with the flow you will end up overweight or obese.”<sup>19</sup> Cheap, tasty, heavily marketed, high-calorie food is readily available to most Americans, most of the time—in grocery stores, restaurants, schools, workplaces, and homes—whereas fresh and appealing nutrient-rich foods are more expensive and less convenient.<sup>20</sup> The ecological model of health emphasizes the importance of these kinds of environmental determinants alongside individual-level genetic, biological, and behavioral determinants.<sup>21</sup>

With regard to the use of law and policy tools for promoting population health, one of the key principles to emerge from the shift to the ecological model of health is “Health in All Policies” (HiAP). “HiAP is a horizontal, complementary policy-related strategy . . . for contributing to population health. The core of HiAP is to examine determinants of health . . . which can be influenced to improve health but are mainly

---

adult obesity increased in the United States throughout the period from 1976 and 2000, but that between 2000 and 2008, there was no significant change among women and only a slight increase in prevalence among men); Cynthia L. Ogden, *Prevalence of Obesity and Trends in Body Mass Index Among US Children and Adolescents: 1999-2010*, 307 J. AM. MED. ASS’N 483 (2012) (finding that the prevalence of childhood obesity increased in the 1980s and 1990s but there were no significant changes in prevalence between 1999 and 2008).

18. See, e.g., Rebecca M. Puhl & Chelsea A. Heuer, *Obesity Stigma: Important Considerations for Public Health*, 100 AM. J. PUB. HEALTH 1019, 1021 (2010).

“Public health efforts must address the multiple forces contributing to the development and maintenance of obesity and recognize that individual behaviors are powerfully shaped by the obesogenic environment. . . . There is increasing consensus that environmental change is essential to the solution of obesity.” *Id.*

19. Daniel DeNoon, *How Did the Nation Get So Fat?*, WEBMD.COM (May 13, 2012), <http://blogs.webmd.com/webmd-guests/2012/05/how-did-the-nation-get-so-fat.html> (quoting CDC Director Tom Frieden).

20. See, e.g., The Obesity Prevention Source: Toxic Food Environment, HARVARD SCHOOL OF PUB. HEALTH, <http://www.hsph.harvard.edu/obesity-prevention-source/obesity-causes/food-environment-and-obesity/> (last visited Mar. 7, 2013).

21. See Wiley, *supra* note 12, at 222-23.

controlled by policies of sectors other than health.”<sup>22</sup> The HiAP principle represents “a reconceptualization of what constitutes health policy” to include “policies in societal domains far removed from traditional health policy.”<sup>23</sup> As one U.S. advocacy organization puts it, “[f]rom agriculture policy that influences the food on our dinner table to national environmental decisions that put us at risk for disease, every choice we make brings us closer to, or moves us further from, our national health goals.”<sup>24</sup> By “highlight[ing] the fact that the risk factors of major diseases, or the determinants of health, are modified by measures that are often managed by other government sectors as well as by other actors in society,” the HiAP principle naturally “shift[s] the emphasis . . . from individual lifestyles and single diseases to societal factors and actions that shape our everyday living environments.”<sup>25</sup>

The HiAP principle is most explicitly recognized at the international level in the World Health Organization’s 2010 Adelaide Statement on Health in All Policies, which calls on “all sectors [to] include health and well-being as a key component of policy development,” and advocates for “a new form of governance where there is joined-up leadership within governments, across all sectors and between levels of government.”<sup>26</sup> But the basic concept behind HiAP has been an important part of global health law and policy for decades. In 1986, for example, the World Health Organization’s Ottawa Charter on Health Promotion sought to “put[] health on the agenda of policymakers in all sectors and at all levels, directing them to be aware of the health consequences of their decisions and to accept their responsibilities for health.”<sup>27</sup> The HiAP principle has been particularly influential in the European Union, where it has been intimately connected with movements to study and influence the social and environmental determinants of health, on the one hand, and with advocacy

---

22. Marita Sihto et al., *Principles and Challenges of Health in All Policies*, HEALTH IN ALL POLICIES: PROSPECTS AND POTENTIALS, 4 (Timo Ståhl et al. eds., 2006) available at [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0003/109146/E89260.pdf](http://www.euro.who.int/__data/assets/pdf_file/0003/109146/E89260.pdf).

23. David R. Williams & Pamela Braboy Jackson, *Social Sources of Racial Disparities in Health*, 24 HEALTH AFF. 325 (2005).

24. Health in All Policies, ASPEN INSTITUTE, <http://www.aspeninstitute.org/policy-work/health-biomedical-science-society/health-stewardship-project/principles/health-all> (last visited Mar. 7, 2013).

25. HEALTH IN ALL POLICIES: PROSPECTS AND POTENTIALS, Preface, xvi (Timo Ståhl et al. eds., 2006).

26. Adelaide Statement, *supra* note 10.

27. The Ottawa Charter for Health Promotion, WHO (Nov. 21, 1986) available at <http://www.who.int/healthpromotion/conferences/previous/ottawa/en/index1.html>.

efforts surrounding reform of European food and agricultural policy, on the other.<sup>28</sup>

Although the HiAP principle has gained considerable traction among policymakers and health advocates, it has not been the subject of significant legal analysis or theorization. Law and policy scholars have tended to conflate the HiAP principle with the particular procedural tool known as Health Impact Assessment.<sup>29</sup> Health Impact Assessment (HIA) is “a systematic process that uses an array of data sources and analytic methods and considers input from stakeholders to determine the potential effects of a proposed policy, plan, program, or project on the health of a population and the distribution of those effects within the population.”<sup>30</sup> In some ways, recognition of the HIA tool among advocates and policymakers seems to be surpassing recognition of the broader HiAP principle.<sup>31</sup> Some commentators have even subrogated the HiAP principle to the HIA tool. For example, the National Research Council’s Committee on Health Impact Assessments argues that “[f]or more resources to become available to support the development of HIA practice, society as a whole has to recognize the importance of considering health in all policies, programs, plans, and projects to improve quality of life and to protect the health of future generations.”<sup>32</sup> It is perhaps not surprising that the HIA tool is

---

28. See Sihto et al., *supra* note 22, at 6-7 (describing HiAP as “intrinsically linked to the rise of environmental and ecological analysis in the 1970s and 1980s”); *id.* at 53-55, 93-110 (assessing the European Union’s Common Agricultural Policy from a HiAP perspective).

29. See, e.g., Benjamin R. Rajotte et al., *Health in All Policies: Addressing the Legal and Policy Foundations of Health Impact Assessment*, 39 SUPPL. 1 J. L. MED. ETHICS 27 (2011), available at <http://www.aslme.org/media/downloadable/files/links/0/5/05.Rajotte.pdf>; Dylan Scott, *Health Impact Assessments: Bringing Health to All Policies*, GOVERNING.COM (Apr. 26, 2012), <http://www.governing.com/blogs/view/gov-health-impact-assessments-bringing-health-to-all-policies.html>; Janet Collins & Jeffrey P. Koplan, *Health Impact Assessment: A Step Towards Health in All Policies*, 302 J. AM. MED. ASS’N 315 (2009), available at [http://www.hiacollaborative.org/downloads/JAMA\\_HIA\\_2009.pdf](http://www.hiacollaborative.org/downloads/JAMA_HIA_2009.pdf); *Health Impact Assessment (HIA): A Tool to Benefit Health in All Policies*, AM. PUB. HEALTH ASS’N, available at <http://www.apha.org/NR/rdonlyres/171AF5CD-070B-4F7C-A0CD-0CA3A3FB93DC/0/HIABenefitHlth.pdf> (discussing HiAP primarily in the form of the HIA).

30. NATIONAL RESEARCH COUNCIL, COMMITTEE ON HEALTH IMPACT ASSESSMENT, IMPROVING HEALTH IN THE UNITED STATES: THE ROLE OF HEALTH IMPACT ASSESSMENT 15 (2011).

31. See Scott, *supra* note 29 (noting growing interest in HIAs among advocates and policymakers, as evidenced by a major National Health Impact Assessment Meeting attended by more than 400 public health advocates and policymakers in Washington, D.C., in 2012).

32. NATIONAL RESEARCH COUNCIL, *supra* note 30, at 128.

beginning to wag the HiAP dog. Whereas HiAP is a broadly defined and perhaps somewhat amorphous goal, HIAs are a concrete tool, the usefulness of which may be more readily apparent to advocates and policymakers. Furthermore, HIA practice has already begun to generate a community of professionals trained to perform HIAs, who then have a stake in promoting their use.

HIAs are mandated or recommended through legislation in the European Commission,<sup>33</sup> the United Kingdom,<sup>34</sup> Thailand,<sup>35</sup> Australia,<sup>36</sup> New Zealand,<sup>37</sup> and elsewhere. Scholars and advocates have argued that HIAs should play a more significant role in policymaking at the federal, state, and local levels in the United States, but thus far they have only been

---

33. See, e.g., EUROPEAN POLICY HEALTH IMPACT ASSESSMENT – A GUIDE 6 (May 2004), available at [http://ec.europa.eu/health/ph\\_projects/2001/monitoring/fp\\_monitoring\\_2001\\_a6\\_frep\\_11\\_en.pdf](http://ec.europa.eu/health/ph_projects/2001/monitoring/fp_monitoring_2001_a6_frep_11_en.pdf).

34. UNITED KINGDOM DEP'T OF HEALTH, HEALTH IMPACT ASSESSMENT OF GOVERNMENT POLICIES 3 (2010), available at [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/documents/digitalasset/dh\\_120110.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_120110.pdf).

35. See Wiput Phoolcharoen et al., *Development of Health Impact Assessment in Thailand: Recent Experiences and Challenges*, 81 BULLETIN WORLD HEALTH ORGANIZATION 465 (2003), available at <http://www.who.int/bulletin/volumes/81/6/phoolcharoen.pdf>; THAILAND'S RULES AND PROCEDURES FOR THE HEALTH IMPACT ASSESSMENT OF PUBLIC POLICIES, NATIONAL HEALTH COMMISSION OFFICE THAILAND 6-7 (Apr. 2010), available at [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CDEQFjAA&url=http%3A%2F%2Fwww.nationalhealth.or.th%2Findex.php%3Foption%3Dcom\\_docman%26task%3Ddoc\\_download%26gid%3D203&ei=MkDCUKLEKsrt0gGwo4GICA&usq=AFQjCNErJX2Jbu6OgKt3TrLao9LNlgOtMg](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CDEQFjAA&url=http%3A%2F%2Fwww.nationalhealth.or.th%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D203&ei=MkDCUKLEKsrt0gGwo4GICA&usq=AFQjCNErJX2Jbu6OgKt3TrLao9LNlgOtMg) (document will automatically download).

36. See HEALTH IMPACT ASSESSMENT GUIDELINES, NAT'L PUB. HEALTH PARTNERSHIP AUSTRALIA vii (Sept. 2001), available at [http://www.health.gov.au/internet/main/publishing.nsf/content/35F0DC2C1791C3A2CA256F1900042D1F/\\$File/env\\_impact.pdf](http://www.health.gov.au/internet/main/publishing.nsf/content/35F0DC2C1791C3A2CA256F1900042D1F/$File/env_impact.pdf).

37. Louise Signal & Gillian Durham, *Health Impact Assessment in the New Zealand Policy Context*, 15 SOC. POL. J. NEW ZEALAND 11, 11-12 (2000), available at [http://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj15/15\\_pages11\\_26.pdf](http://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj15/15_pages11_26.pdf).

mandated in a handful of jurisdictions.<sup>38</sup> The methodologies on which HIAs rely have been the subject of extensive research and development.<sup>39</sup>

The HiAP principle has enormous potential to translate the lessons of the ecological model of public health into evidence-based law and policy interventions. But to fulfill this potential, the HiAP principle must be understood as broader and more nuanced than the use of any particular procedure-based tool. The use of HIAs to shape internal agency decision-making has perhaps been underutilized in efforts to reform USDA programs. But cross-sector integration also requires coordinated advocacy and coalition building to exert outside pressure on the legislative and executive branches of government, through lobbying and litigation. I argue that this external pressure should be aimed at producing *substantive* mandates from the legislature to administrative agencies in “non-health” sectors, rather than simply imposing *procedural* requirements that health impacts be taken into account in the work of those agencies.

### III. USDA’s Role in Shaping the Food System

USDA administers programs in four basic areas that have enormous influence on obesity-related chronic diseases: dietary guidelines, agricultural subsidies, nutrition assistance programs, and school meal programs. Historically, these programs have primarily served the interests of the American agriculture, food, and beverage industries. USDA programs to dispose of surplus agricultural goods quickly became popular with those industries.<sup>40</sup> But the success of these programs in alleviating nutritional distress “has consistently been disputed by nutritionists and advocates for the poor.”<sup>41</sup> The early programs focused entirely on what goods were in surplus, with no consideration given to promoting

---

38. See generally NATIONAL RESEARCH COUNCIL, *supra* note 31; see also LEGAL REVIEW CONCERNING THE USE OF HEALTH IMPACT ASSESSMENTS IN NON-HEALTH SECTORS, SANDRA DAY O’CONNOR COLLEGE OF LAW, available at <http://www.healthimpactproject.org/resources/body/Legal-Review.pdf> (reviewing 36 jurisdictions and finding only four instances of HIA’s being required by law). Note that HIAs are also used to assess private initiatives, but because this Article is focused on the application of HiAP to governmental decision-making, those applications are beyond its purview.

39. See, e.g., JOHN KEMM ET AL., HEALTH IMPACT ASSESSMENT (2004) (providing “an overview of the concepts, theory, techniques, and applications of HIA to aid all those preparing projects or carrying out assessments.”).

40. See, e.g., Michael Lipsky & Marc A. Thibodeau, *Domestic Food Policy in the United States*, 15 J. Health Pol’y, Pol. & L. 319, 321 (2008).

41. *Id.*



availability of nutrient-rich foods.<sup>42</sup> Efforts to reform these programs, driven by coalitions of advocates across sectors, date back to at least the late 1960s.<sup>43</sup> Evolving coalitions of scientists and advocates concerned about hunger, poverty, environmental conservation, public health, and the economic wellbeing of small-scale farming operations have played a role in exerting outside pressure to reform USDA programs.<sup>44</sup> Early advocacy focused primarily on reform of nutrition assistance programs.<sup>45</sup> In recent years, reform efforts focused on school meal programs and farm subsidies have taken center stage, with varying degrees of success.<sup>46</sup>

### A. Dietary Guidelines

USDA involvement in nutrition dates back to 1902, when the agency promulgated “Principles of Nutrition and Nutritive Value of Food” through its *Farmers’ Bulletin*.<sup>47</sup> The publication included information on the average protein, fat, carbohydrate, and calorie composition of a long list of foods and warned of the dangers of a diet consisting solely of foods that “furnish too much energy and too little building material.”<sup>48</sup> USDA first offered comprehensive and specific dietary guidelines in issues of its *Farmers’ Bulletin* published in 1916 and 1917.<sup>49</sup> These were periodically

---

42. *Id.*; see also Karen Terhune, *Reformation of the Food Stamp Act: Abating Domestic Hunger Means Resisting “Legislative Junk Food,”* 41 CATH. U.L. REV. 421, 424 (1992) (noting that early programs were nutritionally insufficient because of the scarcity of fruits, vegetables, and meat products); William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with our Nation’s Tax Dollars*, 28 STAN. ENV’T L.J. 213, 280 (2009) (farmers overproduce low nutrition crops, and thus create surpluses of those crops, because “these crops are favored by federal agricultural policy”).

43. See Lipsky & Thibodeau, *supra* note 40, at 321.

44. *Id.*

45. *Id.*

46. *Id.* at 323-24

47. W.O. Atwater, *Principles of Nutrition and Nutritive Value of Food*, UNITED STATES DEP’T OF AGRIC. FARMERS’ BULLETIN No. 142 (1902).

48. *Id.* at 45.

49. Caroline L. Hunt, *Food for Young Children*, UNITED STATES DEP’T OF AGRIC. FARMERS’ BULLETIN No. 717 (1916) (providing the advice of the “best authorities” in a format “specially adapted to the use of mothers who wish some simple and short discussion of the subject expressed in housekeepers’ terms”); Caroline L. Hunt & Helen W. Atwater, *How to Select Foods*, UNITED STATES DEP’T OF AGRIC. FARMERS’ BULLETIN No. 808 (1917) (“tell[ing] very simply what the body needs to obtain from its food for building its tissues, keeping it in good working order, and providing it with fuel or energy for its muscular work” and “suggest[ing] that, by remembering these groups and having them all suitably represented in the daily diet, the housekeeper can

revised to provide advice to “housekeepers” regarding the most economical use of their food budgets.

In 1943, USDA drew on the Recommended Daily Allowances developed by the National Academy of Sciences to create the National Wartime Nutrition Guide, introducing the “Basic Seven” food groups.<sup>50</sup> The influence of industry lobbying on these guidelines is perhaps most evident in the inclusion of “milk and milk products” and “butter and fortified margarines” as two of the seven food groups.<sup>51</sup> These guidelines were promoted through posters and pamphlets and in demonstrations at local extension schools.<sup>52</sup> For simplicity’s sake, the Basic Seven were retooled as the “Basic Four” food groups and serving size recommendations were added in a 1956 USDA booklet.<sup>53</sup>

In 1967, a series of events—including the airing of a documentary called *Hunger in America* on broadcast television—raised awareness about problems of poverty, hunger, and malnutrition in the United States.<sup>54</sup> The following year, the U.S. Senate created the Select Committee on Nutrition and Human Needs to address these issues.<sup>55</sup> The committee’s first task was to expand food assistance programs, described below.<sup>56</sup> But it eventually turned its attention to nutrition guidelines.<sup>57</sup> In 1977, the Committee published new Dietary Goals for the United States.<sup>58</sup> The recommendations, which were heavily influenced by the testimony of medical researchers and nutritionists, recommended that Americans reduce their fat, saturated fat, and cholesterol intake.<sup>59</sup> The guidelines provoked an immediate backlash by the dairy, egg, and cattle industries.<sup>60</sup> Under

---

easily plan attractive meals which meet the needs of her family without waste of money or material”).

50. Susan Welsh et al., *A Brief History of Food Guides in the United States*, 27 NUTRITION TODAY 6, 8-9 (1992); see also *The Basic Seven*, NORTH CAROLINA STATE UNIVERSITY HISTORY DEPARTMENT, available at <http://history.ncsu.edu/projects/ncsuhistory/nceats/exhibits/show/nutrition/scarcity/basic-seven>.

51. Welsh et al., *supra* note 50, at 9.

52. *Id.*

53. *Id.*

54. See Terhune, *supra* note 42, at 425 (citing NICK KOTZ, LET THEM EAT PROMISES: THE POLITICS OF HUNGER IN AMERICA (1969)).

55. See S. SELECT COMM. ON NUTRITION AND HUMAN NEEDS, THE FOOD GAP, 91st Cong., 1st Sess., (1969).

56. *Id.* at 21.

57. *Id.* at 36-37.

58. S. SELECT COMM. ON NUTRITION AND HUMAN NEEDS, DIETARY GOALS FOR THE UNITED STATES, 95th Cong., 1st Sess. (1977).

59. *Id.* at 1-2.

60. See Emily J. Schaeffer, *Is the Fox Guarding the Henhouse? Who Makes the Rules in American Nutrition Policy?* 57 FOOD & DRUG L.J. 371, 397-98 (2002).

intense lobbying pressure, the Committee issued a revised version later that year, which significantly softened recommendations regarding fat and cholesterol.<sup>61</sup>

Pursuant to a legislative mandate,<sup>62</sup> the “Dietary Guidelines for Americans” (DGAs) have been jointly published by DHHS and USDA every five years since 1980,<sup>63</sup> and are the current basis of much of USDA’s work on nutrition.<sup>64</sup> Coordination between the agencies is handled by the Office of Disease Prevention and Health Promotion on the DHHS side, and by the Center for Nutrition Policy and Promotion and the Agricultural Research Service on the USDA side.<sup>65</sup> USDA, DHHS, and other agencies promote the guidelines using the “food pyramid” and more recently “My Plate”—both of which simplify the guidelines and put them in a graphic form that can be reproduced on posters, in school textbooks, on cereal boxes, and more.<sup>66</sup> These graphic representations have not emphasized the DGAs guidance regarding limiting fat and cholesterol intake, however.

USDA and DHHS have been pressured through litigation to make the methodology they use to revise the DGAs more transparent. In 1999, the Physicians Committee for Responsible Medicine (PCRM), a non-profit organization that promotes preventive medicine, filed suit against USDA and DHHS<sup>67</sup> alleging that the DGA revision process was conducted “largely in secret, by a committee that included individuals with links to the meat, dairy, and egg industries.”<sup>68</sup> The court ruled in PCRM’s favor,<sup>69</sup> and

---

61. See U.S. SENATE SELECT COMM. ON NUTRITION AND HUMAN NEEDS, *DIETARY GOALS FOR THE UNITED STATES* (2d ed., 1977).

62. 7 U.S.C. § 5341 (West 2012).

63. Previous Guidelines & Reports, HHS, <http://health.gov/dietaryguidelines/pubs.asp#eighties> (last visited Mar. 7, 2013). See also National Nutrition Monitoring and Related Research Act of 1990, Pub. L. No. 101-445, 104 Stat 1034 (1990) (requiring the “secretaries” to issue nutritional guidelines at least every five years).

64. DHHS, *Dietary Guidelines for Americans*, HEALTH.GOV, <http://health.gov/dietaryguidelines/> (last visited Mar. 2, 2013).

65. See DHHS, *History of Dietary Guidelines for Americans*, HEALTH.GOV, <http://www.health.gov/dietaryguidelines/history.htm#6> (last visited Mar. 2, 2013).

66. *USDA Replaces Food Pyramid with ‘MyPlate’ in Hopes to Promote Healthier Eating*, WASHINGTON POST (June 3, 2011), available at [http://articles.washingtonpost.com/2011-06-03/national/35236118\\_1\\_myplate-food-pyramid-usda-headquarters](http://articles.washingtonpost.com/2011-06-03/national/35236118_1_myplate-food-pyramid-usda-headquarters).

67. See *Physicians Committee for Responsible Medicine v. Glickman*, 117 F. Supp.2d 1 (D.D.C. 2000).

68. See *PCRM Sues USDA Over Deceptive Dietary Guidelines*, PCRM, <http://pcrm.org/good-medicine/2011/springsummer/pcrm-sues-usda-over-deceptive-dietary-guidelines> (last visited Mar. 2, 2013) [hereinafter PCRM Sues].

the 2005 DGA revision process was more transparent as a result. In 2010, the Dietary Guidelines Advisory Council adopted a new method that drew on USDA's Nutrition Evidence Library "to conduct evidence-based, systematic reviews of the research related to the major questions addressed by the DGA."<sup>70</sup> Evidence profiles for each review were made available to the public online.<sup>71</sup>

DHHS and USDA have made progress toward incorporating public health and nutrition goals into the DGAs, but controversy over industry influence continues.<sup>72</sup> In addition to the scientific reviews described above, the 2010 guidelines were based on public hearings, which "drew thousands of comments from individuals and public health experts, as well as from powerful food industry groups—the Grocery Manufacturers Association, the Sugar Association, the National Milk Producers Federation, and the National Cattleman's Beef Association, among them."<sup>73</sup> Critics have argued that the DGAs should be more clear in their advice to consumers. The "key recommendations" of the 2010 DGAs

spell out specific *food components* that Americans need to cut back on—among them, sodium, saturated and trans fat, added sugars, and refined grains. But the document could have been much more direct, telling people which *foods* to avoid—for example, to cut sugary soft drinks, red meat, white bread, French fries, and other American staples.<sup>74</sup>

Notably, the Advisory Committee's experts offer recommendations that guide the DGA development process, but there is not a mechanism for them to provide input regarding the wording of the final document.<sup>75</sup> These concerns led PCRM once more to file suit against USDA and DHHS

---

69. *Glickman*, 117 F. Supp.2d at 3 (holding that plaintiffs were entitled to summary judgment on their Federal Advisory Committee Act claim and to the release of some—but not all—sought after documents on their Freedom of Information Act claim).

70. DHHS, Dietary Guidelines, Frequently Asked Questions, HEALTH.GOV, <http://health.gov/dietaryguidelines/faq.asp#faq8> (last visited Mar. 2, 2013).

71. See USDA Nutrition Evidence Library, 2010 Dietary Guidelines Advisory Council NEL Evidence-Based Systematic Reviews, <http://www.nutritionevidencelibrary.com/category.cfm?cid=21> (last updated July 14, 2010).

72. Harvard School of Public Health, The Nutrition Source, New U.S. Dietary Guidelines: Progress, Not Perfection, <http://www.hsph.harvard.edu/nutritionsource/dietary-guidelines-2010/> (last visited Mar. 2, 2013).

73. *Id.*

74. *Id.*

75. *Id.*

over the 2010 DGAs.<sup>76</sup> PCRM accused the agencies “of using deliberately obscure language regarding foods Americans should avoid” and cited conflicts of interest as the cause.<sup>77</sup> But this time around the suit was dismissed for lack of standing.<sup>78</sup>

Although the DGAs have moved toward a more evidence-based approach aimed at promoting healthy eating, rather than industry interests, their impact on population health is unclear. Neither USDA nor DHHS is mandated to evaluate the impact of the DGAs on population health. Indeed, comprehensive evaluation would involve considerable methodological challenges, and therefore considerable resources.<sup>79</sup>

Very few Americans actually comply with the DGAs,<sup>80</sup> but the lack of stringent compliance does not necessarily mean that the DGAs are not influencing consumer choices. Research suggests that healthy eating education campaigns (many of which are based on the DGAs)<sup>81</sup> may have an impact on purchasing decisions about some kinds of foods, but not others.<sup>82</sup> The DGAs are also incorporated into “Nutrition Facts” labeling of packaged foods,<sup>83</sup> which research suggests leads to increased sales of some (but not all) products deemed by researchers to be “more healthful” compared to “standard” counterpart products.<sup>84</sup> For example, studies of the U.S. food supply over time indicate that consumers have shifted to lower-fat milks, as recommended by the DGAs.<sup>85</sup> Data regarding the food supply also indicates, however, that per-capita consumption of cheese, a high-fat

---

76. See PCRM Sues, *supra* note 68.

77. *Id.*

78. Physicians Committee for Responsible Medicine v. Vilsack, 867 S.Supp.2d 24, 26-27 (D.D.C. 2011).

79. See Joanne F. Guthrie & David M. Smallwood, *Evaluating the Effects of the Dietary Guidelines for Americans on Consumer Behavior and Health: Methodological Challenges*, 103 J. AM. DIETETIC ASS'N S42, S48 (2003).

80. Dennis M. Bier et al., *Improving Compliance With Dietary Recommendations: Time for New, Inventive Approaches?*, 43 NUTRITION TODAY 180, available at <http://www.nursingcenter.com/upload/static/403753/nt080015.pdf> (finding that three in one hundred US adults follow all recommendations to consume five servings of fruits and vegetables, to exercise regularly and maintain proper weight, and to abstain from tobacco).

81. See Questions and Answers on the 2010 Dietary Guidelines for Americans, USDA at 8, available at <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/QandA.pdf>.

82. Guthrie & Smallwood, *supra* note 79, at S47.

83. See Questions and Answers, *supra* note 81, at 8.

84. See Mario F. Teisl et al., *Measuring the Welfare Effects of Nutrition Information*, 83 AM. J. AGRIC. ECON. 133, 148 (2001).

85. See Guthrie & Smallwood, *supra* note 79, at S47.

dairy product, has increased.<sup>86</sup> And in spite of decades of promotion of the “Five-A-Day” initiative (recently rebranded as “More Matters”), Americans have not significantly increased their consumption of fruits and vegetables.<sup>87</sup>

### *B. Agricultural Subsidies and Commodity Market Deregulation*

While the Dietary Guidelines are explicitly focused on encouraging healthy eating, other USDA programs arguably have a much greater influence on people’s choices about food.<sup>88</sup> Agricultural subsidies—adopted and periodically revised through the Farm Bill roughly every four years—and deregulation of the agricultural commodity market have been targeted by commentators for promoting unhealthy eating by subsidizing the low prices of many unhealthy foods.<sup>89</sup> The result is a one foot on the

86. *Id.*

87. See, e.g., Sarah Stark Casagrande et al., *Have Americans Increased their Fruit and Vegetable Intake? The Trends between 1988 and 2002*, 32 AM. J. PREVENTIVE MED. 257 (2007).

88. The impact of agriculture subsidies on population health has been a matter of dispute. Compare Mike Russo, *Apples to Twinkies: Comparing Federal Subsidies of Fresh Produce and Junk Food*, U.S. PIRG EDUCATION FUND (Sept. 2011), available at <http://www.uspirgedfund.org/sites/pirg/files/reports/Apples-to-Twinkies-web-vUS.pdf> (equating grain, oilseed, and especially corn subsidies with junk food subsidies), with Bradley J. Rickard et al., *Have Agricultural Policies Influenced Caloric Consumption in the United States?*, Working Paper, Charles H. Dyson School of Applied Economics and Management, (Apr. 2012), available at <http://dyson.cornell.edu/research/researchpdf/wp/2011/Cornell-Dyson-wp1112.pdf> (arguing that the elimination of grain and oilseed subsidies has minimal impact on caloric consumption), and Food and Water Watch & The Public Health Institute, *Do Farm Subsidies Cause Obesity? Dispelling Common Myths About the Farm Bill and Public Health* (finding that “the deregulation of commodity markets—not subsidies—has had a significant impact on the price of commodities . . . [while also providing] benefits and incentives to the food industry, including processors, marketers and retailers, and is one of a number of contributing factors impacting the availability of high-calorie processed foods in the marketplace,” and concluding that public health and family farm groups “can find common ground . . . by moving beyond the focus on subsidies and instead advocating for comprehensive commodity policy reform that reduces overproduction and stabilizes price and supply, as well as policies and programs that expand access to healthy food in rural and urban communities”).

89. Tom Karst, *USDA Subsidies Favor Junk Food, Report Says*, THE PACKER (Sept. 28, 2011, 9:24 AM), <http://www.thepacker.com/fruit-vegetable-news/USDA-subsidies-favor-junk-food-report-says-130702458.html>; Mike Russo, *supra* note 88 (noting that since 1995, \$16.9 billion in taxpayer subsidies went to junk food ingredients, whereas only \$262 million has gone to apples); see also Arthur Allen, *U.S. Touts Fruit and Vegetables While Subsidizing Animals that Become Meat*, WASHINGTON POST (Oct. 3, 2011), <http://www.washingtonpost.com/national/health-science/us-touts-fruit-and->

gas, one foot on the break approach whereby some government programs are aimed at encouraging healthier eating, while others subsidize unhealthy options.

Agricultural subsidies have a long history at USDA. During the 1920s, over-planting, increases in mechanization, and more advanced fertilization techniques created a boom in production that led to a tremendous surplus and corresponding price drop.<sup>90</sup> The election of Franklin D. Roosevelt at the peak of the Great Depression led to the first farm subsidies in 1933 as part of the New Deal.<sup>91</sup>

Congress's initial plan was to purchase certain surplus crops in good years and sell them in bad.<sup>92</sup> In response to previous overplanting problems, the government would also pay farmers to conserve farm land by not growing any crops at all.<sup>93</sup> The first comprehensive farm bill, the Agricultural Adjustment Act of 1933, was struck down by the Supreme Court in the final years of the *Lochner* era for exceeding Congress's constitutionally enumerated powers.<sup>94</sup> In the meantime, more limited (and constitutionally permissible) soil conservation programs were initiated under the Soil Conservation Act of 1935<sup>95</sup> and the Soil Conservation and Domestic Allotment Act of 1936.<sup>96</sup> Soil conservation programs provided economic support to farmers and protected land resources from soil erosion by paying farmers to refrain from planting commodity crops viewed as being in oversupply.<sup>97</sup>

---

vegetables-while-subsidizing-animals-that-become-meat/2011/08/22/glQATFG5IL\_story.html.

90. Eubanks II, *supra* note 42, at 218-19.

91. See DANIEL IMHOFF, *FOOD FIGHT: THE CITIZEN'S GUIDE TO THE NEXT FOOD AND FARM BILL* 50 (2012).

92. *Id.*

93. *Id.*

94. The law could not be justified as a valid exercise of the Commerce Clause because the Court found that the commerce in question was intrastate and the Court held that it could not be justified as an exercise of the taxing power because its stated purpose was to regulate agricultural production, rather than raise revenue for the United States. See *United States v. Butler*, 297 U.S. 1 (1936); see also Nathan R.R. Watson, *Federal Farm Subsidies: A History of Governmental Control, Recent Attempts at a Free Market Approach, the Current Backlash, and Suggestions for Future Action*, 8 DRAKE J. AGRIC. L. 279, 285 (2004).

95. Soil Conservation act of 1935, Pub. L. No. 74-46, 49 Stat. 163 (1935).

96. Soil Conservation and Domestic Allotment Act of 1936, Pub. L. No. 74-461, 49 Stat. 1148 (1936).

97. Robert W. Adler, *Balancing Compassion and Risk in Climate Adaptation: U.S. Water, Drought, and Agricultural Law*, 64 FLA. L. REV. 201, 248 (2012).

Congress's second attempt at a comprehensive farm bill, following the "switch in time that saved nine," was more successful.<sup>98</sup> The Agricultural Adjustment Act of 1938 implemented mandatory price supports and quotas for corn, cotton, and wheat in addition to expanding soil conservation programs.<sup>99</sup> The 1938 Act also established the Federal Crop Insurance Corporation to subsidize crop insurance premiums.<sup>100</sup> Over the next several decades, Congress adopted a series of agricultural subsidy bills that made minor changes but retained the same basic approach. Over time, these "emergency measures . . . gradually became institutionalized" as the average farm became a mega corporation, and the farm lobby grew in power and influence.<sup>101</sup>

Modern farm bills have each been authorized for a specified number of years, meaning that if Congress fails to pass a new farm bill to go into effect when the previous one expires, commodity programs and price supports revert to the permanent provisions of New Deal era laws. Although there has been significant stability in agriculture subsidy programs over the years, the process of periodic reauthorization has created space for significant reform when the political conditions for it have been right.

Following mid-term elections in 1994 in which Republicans gained control of both houses of Congress for the first time in four decades, the Federal Agriculture Improvement and Reform Act of 1996<sup>102</sup> (more commonly known as the "Freedom to Farm Act") brought about a major shift toward a free market approach. The 1996 Act

prohibited the federal government from making any further 'deficiency payments' (i.e. commodity price support payments) to farmers, which the government had previously made whenever the price for a given commodity fell below a federally-set floor. In place of deficiency payments, 'production flexibility contracts'

---

98. *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942).

99. Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (1938).

100. Pub. L. No. 75-430, 52 Stat. at 72.

101. IMHOFF, *supra* note 91, at 43-44; *see also* Eubanks II, *supra* note 42, at 221 ("Although well-intentioned at the outset, the Farm Bill's subsidy program has gradually snowballed into a legislative package of subsidized commodities that increasingly benefits the largest of agricultural producers."); *id.* at 224 (recalling Agriculture Secretary Butz telling American farmers to "Get Big or Get Out"); *id.* at 229, fig. 1 (comparing the decline in the number of farms and the rise in the average acreage of a farm between 1900 and 1997).

102. Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 896 (1996).



were available to farmers of select commodities [and] gave seven years of fixed payments, [set] to decline each year, until, in theory, farmers were completely weaned off of government price supports by 2002.<sup>103</sup>

In the late 1990s, a downturn in the agricultural commodities market led to a series of ad hoc emergency appropriations for direct payments to bail out the agricultural industry, undermining the plan to wind down subsidies.<sup>104</sup> And in 2002, after Democrats had regained control of the Senate, a new farm bill<sup>105</sup> was passed, retreating from the free market experiment and instituting routine direct payment subsidies. Direct payment subsidies provide payments to grain and oilseed farmers based on their historical acreage and yields, regardless of market conditions.<sup>106</sup> This approach avoided running afoul of international trade laws that prohibit domestic subsidies that create an unfair advantage on the global market. It also created new flexibility for recipients of subsidies to plant a wider range of commodity crops, rather than being compensated based on the specific crop grown. But direct payments essentially amounted to corporate welfare, primarily benefitting large, corporate agribusinesses without any regard to need.<sup>107</sup>

Although the 2002 Farm Bill enhanced subsidies for crops that advocates point to as contributing to unhealthy eating, it also instituted new subsidies for “specialty crops,” including fruits and vegetables.<sup>108</sup> The 2002 negotiations saw the emergence of the “Eggplant Caucus,” made up of senators from states with significant, but less powerful agricultural interests (with a focus on specialty crops like eggplants) as well as those from states where voters were particularly interested in environmental conservation.<sup>109</sup> Nonperishable grain and oilseed commodity crops (like wheat, corn, sorghum, barley, oats, cotton, rice, and soybeans) enjoy the most lucrative subsidies under the Farm Bill.<sup>110</sup> Fruits and vegetables are

---

103. Watson, *supra* note 94, at 290.

104. *Id.* at 293.

105. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002).

106. See § 103, 116 Stat at 149.

107. See EWG Farm Subsidy Database, <http://farm.ewg.org/progdetail.php?fips=00000&progcode=totalfarm&page=conc&regionname=theUnitedStates> (last visited Feb. 28, 2013) (noting that from 1995 to 2011, the top 10 percent of commodity payment recipients were paid 77 percent of commodity payments).

108. Pub. L. No. 107-171, §§ 10601-08, 116 Stat. at 511-13.

109. *The Eggplant Rebellion*, N.Y. TIMES (opinion), Nov. 12, 2001, <http://www.nytimes.com/2001/11/12/opinion/the-eggplant-rebellion.html>.

110. 7 U.S.C. § 8713(b) (2010).

considered “specialty crops” under existing law and do not receive the same benefits as commodity crops.<sup>111</sup> The eggplant caucus pushed for subsidies for specialty crops and conservation programs as part of a more equitable and balanced farm bill and ultimately played an important role in the bill’s passage.<sup>112</sup> Additional programs, including those developed under the Specialty Crops Competitiveness Act of 2004,<sup>113</sup> enhanced subsidies for fruit and vegetable production, primarily through state-administered programs funded through USDA block grants.<sup>114</sup>

Public health groups also began to play a more prominent role around this time. “The ink was barely dry on the [2002 Farm Bill] when diverse interest groups began to form and ready themselves for serious lobbying” in anticipation of negotiations surrounding the 2008 Farm Bill.<sup>115</sup> These efforts coincided with growing awareness of obesity-related health problems and experts across sectors began to link the Farm Bill to the War on Obesity.<sup>116</sup> In 2004, The Prevention Institute published “Cultivating Common Ground: Linking Health and Sustainable Agriculture,” which identified opportunities and strategies for cross-sector advocacy with an emphasis on healthy eating alongside more traditional environmental health concerns like antibiotic resistance and occupational hazards for farm workers.<sup>117</sup> In 2007, the Institute for Agriculture and Trade Policy released reports linking food and agricultural policy to the obesity epidemic<sup>118</sup> and arguing for a “Fair Farm Bill for Public Health.”<sup>119</sup> Publication of popular

---

111. *For a Healthier Country, Overhaul Farm Subsidies*, SCIENTIFIC AMERICAN (Apr. 19, 2012) <http://www.scientificamerican.com/article.cfm?id=fresh-fruit-hold-the-insulin>.

112. *The Eggplant Rebellion*, *supra* note 109..

113. Specialty Crops Competitiveness Act of 2004, Pub. L. No. 108-465, 118 Stat. 3882 (2004).

114. *Id.*

115. Public Health Law Center, *The United States Farm Bill: An Introduction for Fruit and Vegetable Advocates* 2 (Jan. 2009), *available at* <http://publichealthlawcenter.org/sites/default/files/resources/phlc-policy-farm-bill.pdf>.

116. *See, e.g.,* Michael Pollan, *The Way We Live Now: The (Agri)Cultural Contradictions of Obesity*, N.Y. TIMES, Oct. 12, 2003 (linking the obesity epidemic to agricultural subsidies).

117. Larry Cohen et al., *Cultivating Common Ground: Linking Health and Sustainable Agriculture*, PREVENTION INSTITUTE, Sept. 2004, at 2, *available at* [http://www.preventioninstitute.org/index.php?option=com\\_jlibrary&view=article&id=67&Itemid=127](http://www.preventioninstitute.org/index.php?option=com_jlibrary&view=article&id=67&Itemid=127).

118. Mark Muller et al., *Considering the Contribution of U.S. Food and Agricultural Policy to the Obesity Epidemic: Overview and Opportunities*, INST. FOR AGRIC. & TRADE POL’Y (2007).

119. Heather Schoonover, *A Fair Farm Bill for Public Health*, INST. FOR AGRIC. & TRADE POL’Y (2007), *available at* [http://www.iatp.org/files/258\\_2\\_98598.pdf](http://www.iatp.org/files/258_2_98598.pdf).

books like Michael Pollan's *Omnivore's Dilemma* in 2006 and Daniel Imhoff's *Food Fight: A Citizen's Guide to the Next Food and Farm Bill* in 2007 raised public awareness of health and environmental concerns implicated by the negotiation of the 2008 Farm Bill. Food & Water Watch, a nonprofit organization that promotes safe, accessible and sustainable food and water security began to advocate for sweeping farm bill reforms.<sup>120</sup> The Healthy Farms, Healthy People Coalition was formed to "extend[] issues of healthy nutrition into a broader perspective of agriculture and food systems."<sup>121</sup>

The growing coalition among specialty crop and organic farmers, environmental conservationists, and groups concerned with public health has not been without tensions. For example, in addition to fighting for subsidies, specialty crop growers have also exerted their influence to keep the prices of fruits and vegetables high by keeping production low.<sup>122</sup> Dating back to the negotiation of the 1996 Farm Bill, specialty crop growers pushed for provisions that excluded fruit and vegetable production from the increased flexibility in crop choice offered to large farms receiving commodity crop subsidies.<sup>123</sup> Similarly, the emphasis among organic growers and environmental groups on the importance of organic farming methods has not been uniformly supported by public health advocates, many of whom are concerned about the cost, and therefore accessibility, of organic produce, as well as the growing number of calorie dense organic foods with low nutritional value.<sup>124</sup> As the *Cultivating Common Ground* report noted, "even the organic food industry creates an ever-greater number of chips, high-calorie beverages, instant meals, and other processed foods."<sup>125</sup>

In spite of these tensions, a coalition of organic producers, fruit and vegetable growers, anti-hunger advocates, and environmental and public health groups successfully developed proposals for a dramatically different farm bill in 2008.<sup>126</sup> But the public interest coalition faced an uphill battle. Special interest groups, overwhelmingly dominated by agriculture, food

---

120. Food & Water Watch, *Farm Bill 101*, 1 (2012), available at <http://www.foodandwaterwatch.org/tools-and-resources/farm-bill-101/>.

121. Healthy Farms, Healthy People Coalition, <http://hfhpccoalition.org/member-updates/> (last visited Mar. 4, 2013).

122. See, e.g., RENEE JOHNSON & JIM MONKE, CONGRESSIONAL RESEARCH SERVICE, ELIMINATING THE PLANTING RESTRICTIONS ON FRUITS AND VEGETABLES IN THE FARM COMMODITY PROGRAMS (2007), available at <http://www.nationalaglawcenter.org/assets/crs/RL34019.pdf>.

123. See generally *id.*

124. See Cohen et al., *supra* note 117, at 6.

125. *Id.* at 13.

126. See, e.g., Schoonover, *supra* note 119, at 7.

and beverage, chemical, and other industries, spent \$173.5 million on 2008 Farm Bill lobbying.<sup>127</sup>

Ultimately, the Food, Conservation, and Energy Act of 2008 (FCEA)<sup>128</sup> became law after congressional override of President Bush's veto. Reforms in the 2008 Farm Bill were perhaps not as sweeping as the advocacy coalition had hoped, but they were significant nonetheless. A new title was added, focused specifically on fruits and vegetables, horticulture, and organic agriculture.<sup>129</sup> The Act provided increased funding for specialty crop block grants, as well as a Farmers' Market Promotion Program.<sup>130</sup> But direct payments and other commodity crop subsidy programs were retained, and although the 2008 Act included a pilot program to add fruit and vegetable production to planting flexibility provisions for farms that receive commodity crop subsidies, the program was limited to production of fruits and vegetables to be sold to canning or processing companies.<sup>131</sup>

The 2008 Farm Bill expired in September 2012 without a new farm bill in place. In early 2013, Congress passed a nine-month extension of some provisions of the 2008 Act, but not those providing assistance to fruit and vegetable growers and organic farms.<sup>132</sup> Direct payment subsidies were left in place, in spite of an earlier agreement between the full Senate and the House Agriculture Committee to eliminate direct payments in favor of expanded crop insurance subsidies.<sup>133</sup>

Public health advocates remain very much involved in cross-sector advocacy efforts surrounding 2013 Farm Bill negotiations.<sup>134</sup> Advocates in

127. Food & Water Watch, *Cultivating Influence: The 2008 Farm Bill Lobbying Frenzy*, 1 (2012), available at <http://documents.foodandwaterwatch.org/doc/FarmBillLobby.pdf>

128. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008).

129. Pub. L. No. 110-234, Title X, 122 Stat. at 1335.

130. *Id.*

131. Planting Flexibility for Fruits & Vegetables, NAT'L SUSTAINABLE AGRIC. COALITION, <http://sustainableagriculture.net/publications/grassrootsguide/competitive-markets-commodity-program-reform/planting-flexibility-for-fruits-vegetables/> (last visited Mar. 6, 2013).

132. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013).

133. See S. 3240, 112<sup>th</sup> Cong. (2012); H.R. 6083, 112<sup>th</sup> Cong. (2012).

134. See, e.g., Patricia Elliot & Amanda Raziano, *The Farm Bill and Public Health: A Primer for Public Health Professionals*, AM. PUB. HEALTH ASS'N 1, 6, available at <http://www.apha.org/NR/rdonlyres/71D6995A-C346-4227-BDE0-DAB37EF5F16E/0/FarmBillandPublicHealth.pdf>; Food & Water Watch, *supra* note 120; Network for Public Health Law, Public Health Professionals and the Farm Bill:

favor of subsidy reform have taken renewed hope from widespread, bipartisan interest in deficit reduction. Additionally, commentators have taken the failure of the 2012 Farm Bill effort as a sign of the agricultural industry's waning political influence.<sup>135</sup> For now, agricultural subsidies remain very much in flux.

### *C. Nutrition Assistance Programs*

Historically, USDA nutrition assistance programs have been intimately intertwined with subsidies for agricultural production. With the passage of the 1933 Act came the Federal Surplus Relief Corporation (FSRC), which purchased surplus commodities and "distribute[d] them to the needy unemployed."<sup>136</sup> The Agriculture and Food Act of 1935 empowered USDA to distribute surplus food to charitable organizations, including schools and churches, as well as to households.<sup>137</sup> Shortly thereafter in 1939, USDA implemented the Food Stamp Plan (FSP).<sup>138</sup> Under the FSP, low-income individuals could purchase orange stamps that were redeemable for any food item.<sup>139</sup> For every dollar of orange stamps purchased, program participants would also receive 50 cents worth of blue stamps, which could be redeemed for specified surplus foods.<sup>140</sup> The program, though seen as a success, was discontinued in 1943.<sup>141</sup>

For years after the end of the first FSP, various legislators attempted to enact another stamp program.<sup>142</sup> When a law authorizing, but not

---

How to Get Involved (2012), available at [http://www.networkforphl.org/\\_asset/2hj8f8/Farm-Bill-Get-InvolvedFINAL.pdf](http://www.networkforphl.org/_asset/2hj8f8/Farm-Bill-Get-InvolvedFINAL.pdf)

135. See, e.g., Caroline Henshaw, *U.S. Farm Lobby Clout Waning: Abares*, DISPATCH, WALL STREET JOURNAL BLOGS, (Oct. 23, 2012, 2:21 AM), <http://blogs.wsj.com/dispatch/2012/10/23/u-s-farm-lobby-clout-waning-abares/?KEYWORDS=agriculture>.

136. H.R. REP. NO. 73d-520, at 4. See also Federal Emergency Relief and Civil Works Program: Hearing on H.R. 7527 Before the H. Subcomm. on Appropriations, 73rd Cong. 53-54 (1934) (statement of Harry L. Hopkins, Administrator, Federal Emergency Relief Administration, and Civil Works Administration) (describing the structure and activity of the FSRC).

137. Lipsky & Thibodeau, *supra* note 40, at 321.

138. A Short History of SNAP, USDA FOOD AND NUTRITION SERVICE, <http://www.fns.usda.gov/snap/rules/Legislation/about.htm>. This plan was initiated in large part due to America's entry into World War II. Agricultural surpluses were decimated by the war effort and as many as 40% of draftees were rejected for being malnourished. IMHOFF, *supra* note 94, at 50.

139. A Short History of SNAP, *supra* note 138.

140. *Id.*

141. *Id.*

142. *Id.*; see also IMHOFF, *supra* note 94, at 50 (noting that resistance to food assistance programs stemmed in part from fear of socialism).

requiring the Secretary of Agriculture to do just that finally passed in 1959, the Eisenhower administration declined to exercise the authority it was granted.<sup>143</sup> It was not until a 1961 executive order by President Kennedy that the program was reborn on an experimental basis.<sup>144</sup> Like its predecessors, the pilot program subsidized the purchase of surplus foods by low-income households.<sup>145</sup> The success of the pilot program, and the emergence of powerful anti-poverty organizing efforts<sup>146</sup> eventually led to the passage of the Food Stamp Act in 1964 as part of President Lyndon Johnson's War on Poverty.<sup>147</sup>

Though the 1964 Food Stamp Act aimed to "promote the general welfare, . . . safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households,"<sup>148</sup> its first stated goal was "[t]o strengthen the agricultural economy."<sup>149</sup> Like all food assistance programs before it, it was not tied to nutritional guidelines in any way.<sup>150</sup> Since the 1964 law, the FSP has been a staple of the Farm Bill and has been periodically revised and reauthorized alongside agriculture subsidies.<sup>151</sup>

Shortly after the revival of the FSP, anti-hunger groups like the National Council on Hunger and Malnutrition, founded by Dr. Jean Mayer, played an important role in reforming the program.<sup>152</sup> Mayer brought health experts, nutritionists, agricultural representatives, and the government to the table to discuss improvements to the program.<sup>153</sup> But these advocates faced a number of obstacles, including budget constraints

---

143. A Short History of SNAP, *supra* note 138.

144. *Id.*

145. IMHOFF, *supra* note 94, at 51.

146. See generally BARBARA CRUIKSHANK, THE WILL TO EMPOWER: DEMOCRATIC CITIZENS AND OTHER SUBJECTS (1999) (describing the emergence of "the poor" as a diverse, but coherent interest group around the time of Lyndon Johnson's War on Poverty).

147. *Id.*

148. The Food Stamp Act of 1964, Pub. L. No. 88-525, § 2, 78 Stat. 703 (1964).

149. § 1, 78 Stat. 703.

150. IMHOFF, *supra* note 94, at 51 (2012).

151. For a detailed list of legislative and administrative modifications, see Short History of SNAP, *supra* note 138.

152. *Nutrition Professor to be Head of National Hunger Research Council*, THE HARVARD CRIMSON, Jan. 8, 1969, available at <http://www.thecrimson.com/article/1969/1/8/nutrition-professor-to-be-head-of/>.

153. Robert McFadden, *Jean Mayer, 72, Nutritionist Who Led Tufts, Dies*, N.Y. TIMES (Jan. 2, 1993), <http://www.nytimes.com/1993/01/02/us/jean-mayer-72-nutritionist-who-led-tufts-dies.html>.

and poor working relationships with midlevel USDA bureaucrats.<sup>154</sup> Eventually, advocates shifted focus to apply pressure on Congress directly.<sup>155</sup> The Senate Select Committee on Nutrition and Human Needs, relying on data provided by public interest advocates, held hearings chronicling the failings of the existing food stamp program.<sup>156</sup> The resulting pressure on the Nixon administration led to the implementation of significant reforms, with an emphasis on reducing the price of coupons and more generous entitlements.<sup>157</sup>

As hunger issues became the focus of increased mainstream media coverage, public interest continued to grow. The Community Nutrition Institute began publishing a weekly report of changes in law and regulation that affected the food stamp program.<sup>158</sup> The Food Research and Action Center (FRAC) was established as a public interest law firm and lent significant litigation prowess to the cause.<sup>159</sup> The two groups successfully lobbied USDA, and when that failed, often filed suit against the Food and Nutrition Service (FNS), earning several key victories.<sup>160</sup>

In addition to reforming the FSP, Congress established a new nutrition assistance program focused on meeting the needs of low-income pregnant and nursing women, infants, and young children (WIC). When WIC was first established by Congress as a pilot program in 1972,<sup>161</sup> USDA initially declined to implement it, leading FRAC to sue USDA for release of appropriated funds.<sup>162</sup> USDA argued that WIC would duplicate its existing efforts under the Commodity Supplemental Food Program, a direct distribution program that provided surplus commodities to pregnant

---

154. Some of the difficulty in dealing with USDA agents was caused by the advocacy groups' unrelenting criticism of existing programs and characterization of the USDA as uncaring. Jeffrey M. Berry, *Consumers and the Hunger Lobby*, 34:3 FOOD POL'Y & FARM PROGRAMS 68, 72 (1982).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 72-73.

160. *Id.* at 73; *see also* FRAC History, FRAC, <http://frac.org/about/frac-programs-and-initiatives/> (last visited Mar. 10, 2013).

161. National School Lunch Act Amendments of 1972, Pub. L. No. 92-433, 86 Stat. 726 (1972).

162. FRAC History, *supra* note 160; VICTOR OLIVEIRA ET AL., USDA ECONOMIC RESEARCH SERVICE, FOOD ASSISTANCE AND NUTRITION RESEARCH REPORT NO. 27, THE WIC PROGRAM: BACKGROUND TRENDS, AND ISSUES 7 (2002), *available at* [http://www.ers.usda.gov/media/327914/fanrr27c\\_1\\_.pdf](http://www.ers.usda.gov/media/327914/fanrr27c_1_.pdf)

women, infants, and children.<sup>163</sup> In 1973, a federal judge ordered USDA to implement the program.<sup>164</sup>

Unlike other USDA programs, which have historically had the dual purpose of improving nutrition and supporting agriculture, from the start WIC was solely focused on health. When Congress made the program permanent in 1975,<sup>165</sup> its stated purpose was “to provide supplemental nutritious food as an adjunct to good health during . . . critical times of growth and development in order to prevent the occurrence of health problems.”<sup>166</sup>

In most states, WIC recipients receive vouchers that can be exchanged for specifically approved food items at authorized retailers. From the start, WIC was restricted to “supplemental foods,” initially defined as those containing “nutrients known to be lacking in the diets of populations at nutrition risk, in particular foods containing high quality protein, iron, calcium, vitamin A, and vitamin C.”<sup>167</sup> The legislation specified that “[t]he contents of the food package shall be made available in such a manner as to provide flexibility, taking into account medical and nutritional objectives and cultural eating patterns.”<sup>168</sup> The initial food package approved by USDA included milk, cheese, eggs, fruit juice, iron-fortified adult and children’s cereals, and infant formula.<sup>169</sup>

In many ways, WIC has been a model of integration among nutrition assistance, social services, and health services, with WIC agencies serving as important points of contact where mothers and families can be referred to other state services.<sup>170</sup> The 1975 law included an allowance for funds to be used for nutrition education programs for WIC recipients.<sup>171</sup> A few years later, Congress directed that nutrition education must be provided to all WIC recipients and that no less than one-sixth of appropriated funds must be used for this purpose.<sup>172</sup> The 1978 law also required state WIC

---

163. See Eileen Kennedy & Edward Cooney, *Development of the Child Nutrition Programs in the United States*, 131 J. NUTRITION 431S (2001).

164. OLIVEIRA, *supra* note 162.

165. National School Lunch Act and Child Nutrition Act of 1966 Amendments of 1975, Pub. L. No. 94-105, 89 Stat. 511 (1975).

166. Pub. L. No. 94-105, § 17(a).

167. § 17(g)(3).

168. *Id.*

169. USDA FOOD AND NUTRITION SERVICE, WIC FOOD PACKAGES POLICY OPTIONS STUDY, FINAL REPORT (June 2011), *available at* <http://www.fns.usda.gov/Ora/menu/Published/WIC/FILES/WICFoodPackageOptions.pdf> at ix.

170. OLIVEIRA ET AL., *supra* note 162, at 10.

171. Pub. L. No. 94-105, § 17(g)(4), 89 Stat. at 520-21.

172. Child Nutrition Amendments of 1978, Pub. L. No. 95-627, § 17, 92 Stat. 3603 (1978).



agencies to submit annual reports to USDA describing their plans “to coordinate operations under the program with special counseling services[, including] the expanded food and nutrition education program, family planning, immunization, prenatal care, well-child care, alcohol and drug abuse counseling, child abuse counseling, and with the food stamp program.”<sup>173</sup>

Meanwhile, the FSP quickly became a political football. During the Carter administration, several key FNS appointments went to leaders in the hunger lobby, leading to the elimination of user fees for participation in the food stamp program.<sup>174</sup> During the Reagan administration, however, the primary focus of USDA reform efforts shifted to preventing abuse of nutrition assistance programs by recipients.<sup>175</sup>

In the 1980s, USDA also reinvigorated direct distribution programs to dispose of foods created using surplus commodities—including the particularly notorious “government cheese”—held by the Commodity Credit Corporation. USDA began the Temporary Emergency Food Assistance Program (TEFAP) on its own initiative in 1981 and it was eventually made permanent by Congress in 1983.<sup>176</sup> Federal funds were made available to states, which were responsible for storing and distributing food directly to recipients. The program, now referred to as EFAP, was ultimately integrated into the 1990 Farm Bill.<sup>177</sup>

Over time, nutrition and public health advocates have pressured USDA to incorporate a greater emphasis on *nutrition*—and less emphasis on commodities dumping—into the FSP. “While hunger advocates continue to fight to make sure food reaches populations in distress, a bitter irony remains: Farm Bill programs [including food stamps] make sure Americans are fed, but not necessarily nourished.”<sup>178</sup> Here too, advocates have noted the disconnect between USDA’s dietary guidelines and accompanying promotional materials and the unhealthy effects of its other programs: “Despite USDA’s calls for balanced diets packed with nutrients through gimmicks such as the USDA Food Pyramid, the actual practices of the Farm Bill ‘nutrition’ programs illustrate that these programs have

---

173. § 17(f)(1), 92 Stat. 3603.

174. Berry, *supra* note 154, at 73.

175. *Id.*

176. Temporary Emergency Food Assistance Act of 1983, Pub. L. No. 98-8, 97 Stat. 35 (1983).

177. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (1990).

178. IMHOFF, *supra* note 94, at 55.

become nothing more than a way to dump cheap calories from corn and other commodity crops that have no other useful purpose.”<sup>179</sup>

In 1999, the DGAs were incorporated into the FSP, albeit in a rather limited way. USDA’s Center for Nutrition Policy and Promotion revised the Thrifty Food Plan—a suggested market basket that forms the basis of food stamp allotments—to meet the recommendations of the DGAs. The Thrifty Food Plan and the DGAs also form the basis of the Food Stamp Nutrition Education Program, which provides nutrition education to FSP recipients.<sup>180</sup>

In the 2008 Farm Bill, in an effort to combat the stigma associated with food stamps, Congress changed the name of the FSP to the Supplemental Nutrition Assistance Program (SNAP).<sup>181</sup> At around the same time, in a move that would arguably *increase* stigma,<sup>182</sup> a growing number of policymakers began calling for restrictions on the use of SNAP benefits to purchase unhealthy foods and beverages.

Several state and city governments have explored proposals to restrict the use of SNAP benefits. Although SNAP is administered by the states, it is governed by federal regulations and thus state and city governments are barred from instituting new restrictions without a waiver from USDA. In 2004, USDA denied a request from the state of Minnesota to waive federal regulations and allow the state to prohibit the purchase of candy and soda with food stamp benefits.<sup>183</sup> In 2010, New York City requested a waiver to ban the use of SNAP benefits for the purchase of sodas and other sugary beverages, which USDA also denied.<sup>184</sup> And in February 2013, the

179. Eubanks II, *supra* note 42, at 274-75 (internal quotation and citation omitted).

180. USDA CENTER FOR NUTRITION POLICY AND PROMOTION, THE THRIFTY FOOD PLAN: EXECUTIVE SUMMARY 1, 3 (1999); USDA CENTER FOR NUTRITION POLICY AND PROMOTION, RECIPES AND TIPS FOR HEALTHY, THRIFTY MEALS 1 (2000).

181. Food, Conservation, and Energy Act of 2008, Pub L. No. 110-234, 122 Stat. 923, 1092 (2008).

182. Food Research and Action Center, A Review of Strategies to Bolster SNAP’s Role in Improving Nutrition as well as Food Security, <http://frac.org/wp-content/uploads/2011/06/SNAPstrategies.pdf> (last updated Jan. 2013) (“Purchasing restrictions likely would increase confusion and stigma at grocery check-out, potentially causing a decline in SNAP participation that could worsen food insecurity and increase obesity risk among this vulnerable group.”).

183. U.S. Dep’t of Agriculture, Food and Nutrition Service, Letter to Maria Gomez, Assistant Commissioner, Economic and Community Support strategies, Minnesota Department of Human Services (May 4, 2004), *available at* [http://heartland.org/sites/all/modules/custom/heartland\\_migration/files/pdfs/15364.pdf](http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/15364.pdf).

184. U.S. Dep’t of Agriculture, Food and Nutrition Service, Memo to Elizabeth Berlin, Executive Deputy Commissioner, New York State Office of Temporary and Disability Assistance (Aug. 19, 2011), *available at* <http://www.foodpolitics.com/wp-content/uploads/SNAP-Waiver-Request-Decision.pdf>.

Director of South Carolina's Department of Health and Environmental Control proposed restricting the use of SNAP benefits to the list of approved items used for the WIC program and indicated that the state's Department of Social Services would seek a waiver from USDA in the near future.<sup>185</sup> USDA officials continue to express skepticism regarding the appropriateness of restrictions, arguing that incentives to encourage healthy eating are a preferable alternative.<sup>186</sup>

Reformers interested in limiting the use of SNAP benefits to healthy options have pointed to the WIC program as an example.<sup>187</sup> WIC's explicit health focus is evident in the evolution of USDA regulations governing WIC food packages. For example, in 1978, Congress directed USDA "to the degree possible" to "assure that the fat, sugar, and salt content of the prescribed foods is appropriate," though the agency's response was limited to restricting the sugar content of eligible cereals.<sup>188</sup> In 2005, the Institute of Medicine released a report at the request of USDA recommending major changes to the WIC food packages in light of "two, sometimes conflicting, goals: improving dietary quality and food security while also promoting a healthy body weight that will reduce the risk of chronic diseases."<sup>189</sup> The resulting regulations, which went into effect in 2009, include new whole-grain products, restrict adults and children over age two to reduced-fat milk, provide cash-value vouchers to give recipients flexibility to purchase fruits and vegetables according to seasonality, and offer additional benefits for breastfeeding mothers.<sup>190</sup>

---

185. Meg Kinnard, *DHEIC Chief: Restrict Food Stamp Items, Cut Obesity*, THE STATE, Feb 6, 2013, <http://www.thestate.com/2013/02/06/2621322/dhec-chief-restrict-food-stamps.html#.URuIKx03J9E>.

186. Monique Williams, *USDA Says SC Faces Uphill Battle to Change SNAP*, ABC COLUMBIA, at <http://www.abccolumbia.com/news/local/SC-Faces-Uphill-Battle-to-Change-SNAP-200291971.html> (Mar. 27, 2013).

187. Marion Nestle, *Who Benefits Most from Food Stamps*, FOODPOLITICS (June 13, 2012), <http://www.foodpolitics.com/2012/06/who-benefits-most-from-food-stamps-follow-the-money/> ("At present, SNAP recipients have few restrictions on what they can buy with their benefit cards. In contrast, participants in the Women, Infants, and Children program (WIC), which is not a farm bill program, can only use their benefits to buy foods of high nutritional value. The idea of requiring SNAP recipients to do the same has split the advocacy community.").

188. Nutrition Amendments of 1978, Pub. L. No. 95-627, § 17(f)(11), 92 Stat. 3603 (1978).

189. INSTITUTE OF MEDICINE, WIC FOOD PACKAGES: TIME FOR A CHANGE x (2005), available at [http://www.nap.edu/catalog.php?record\\_id=11280](http://www.nap.edu/catalog.php?record_id=11280).

190. VICTOR OLIVEIRA & ELIZABETH FRAZAO, U.S. DEP'T. OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, THE WIC PROGRAM: BACKGROUND, TRENDS, AND ECONOMIC ISSUES 45 (2009), available at <http://www.ers.usda.gov/media/159295/err73.pdf>.

Health-focused reform of the WIC food packages has had a positive impact on the availability of healthy foods in WIC-authorized stores, particularly in lower-income areas.<sup>191</sup> Because WIC-approved retailers are required to carry the foods included in WIC packages, the benefits are enjoyed by WIC participants (who make up about 50% of all infants born in the United States, 25% of children under five, 29% of pregnant women, and 26% of postpartum women)<sup>192</sup>, as well as by non-participants who shop in the same stores.

The issue of SNAP restrictions has prompted a rift between anti-hunger organizations, some of which have vehemently opposed restrictions on the use of SNAP benefits, and public health organizations, some of which have come out in favor of restrictions. Noting that “[i]t makes no sense for government food-assistance dollars, intended to improve the nutritional health of at-risk Americans, to support the consumption of products we know to be unhealthy,” influential food journalist Michael Pollan has also weighed in.<sup>193</sup>

FRAC, an anti-hunger organization that has played a major role in past FSP reforms, has argued that “those suggesting strategies aimed uniquely at keeping poor people from the normal streams of decision-making and commerce bear a burden of justifying that targeting.”<sup>194</sup> FRAC has also pointed to compelling evidence that the food purchases of SNAP beneficiaries are, if anything, slightly healthier than those of non-participants, in spite of the difficulties that many low-income people have in accessing fresh and appealing produce.<sup>195</sup> FRAC echoes the conclusion of USDA’s 2007 report on proposed restrictions: “as the problems of poor food choices, unhealthy diets, and excessive weight characterize all segments of American society, the basis for singling out low-income food

---

191. See Tatiana Andreyeva et al., *Positive Influence of the Revised Special Supplemental Nutrition Program for Women, Infants, and Children Food Packages on Access to Healthy Foods*, 112 J. ACADEMY OF NUTRITION & DIETETICS 850, 855 (2012) (finding a 39% improvement in healthy food supply scores—which measure the availability, variety, prices, and quality of healthy foods—for WIC-authorized stores in lower-income areas following the implementation of the new WIC package).

192. Tatiana Andreyeva, *Effects of Revised Food Packages for Women, Infants, and Children (WIC) in Connecticut*, 27(3) CHOICES 1 (2012), available at [www.choicesmagazine.org/magazine/pdf/cmsarticle\\_254.pdf](http://www.choicesmagazine.org/magazine/pdf/cmsarticle_254.pdf).

193. Michael Pollan, *Farmer in Chief*, N.Y. TIMES (Oct. 9, 2008), [http://www.nytimes.com/2008/10/12/magazine/12policy-t.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/10/12/magazine/12policy-t.html?pagewanted=all&_r=0).

194. Food Research and Action Center, *supra* note 182, at 13.

195. *Id.*

stamp recipients and imposing unique restrictions on their food choices is not clear.”<sup>196</sup>

Pro-restriction commentators have pointed to FRAC’s collaboration with food industry groups “to assemble a loose coalition of food industry lobbyists and anti-hunger groups opposed to restrictions on food stamps” coordinated by a lobbyist under contract with the Snack Food Association.<sup>197</sup> They have pointed to food and beverage industry lobbying against state reform efforts—such as a 2012 Florida bill sponsored by Republican State Senator Ronda Storms, which proposed restrictions on the use of SNAP benefits—as evidence that “improvements” to SNAP face an uphill battle.<sup>198</sup> On the other hand, the accusation that Storms was simply “attacking poor people”<sup>199</sup> gains credence from the fact that her bill would also have prohibited recipients of federal cash assistance from making EBT withdrawals at strip clubs, casinos, and bars.<sup>200</sup> Images of welfare and food stamp recipients living high on the hog at the expense of good, honest taxpayers have long played a role in the politics of nutrition assistance.

Anti-hunger groups have argued that the pro-restriction reform movement puts the entire program at risk at a time when major budget cuts are on the table as part of 2012-13 Farm Bill negotiations.<sup>201</sup> Indeed, a 2008 USDA report on the relationship between Food Stamps and Obesity

---

196. USDA, IMPLICATIONS OF RESTRICTING THE USE OF FOOD STAMP BENEFITS – SUMMARY 7 (2007), available at <http://www.fns.usda.gov/ora/menu/Published/snap/FILES/ProgramOperations/FSPFoodRestrictions.pdf>.

197. Michele Simon, *Food Stamps: Follow the Money*, EATDRINKPOLITICS, June 2012, at 11, available at <http://www.eatdrinkpolitics.com/wp-content/uploads/FoodStampsFollowtheMoneySimon.pdf>.

198. *Id.* at 12-13.

199. Mark Bittman, *Regulating Our Sugar Habit*, N.Y. TIMES OPINIONATOR (Feb. 26, 2012), <http://opinionator.blogs.nytimes.com/2012/02/26/regulating-our-sugar-habit/>.

200. See Katie Sanders, *Ronda Storms’ Food Stamp Law Affects Cash Assistance Too*, POLITIFACT FLORIDA, Feb. 10, 2012, <http://www.politifact.com/florida/article/2012/feb/10/ronda-storms-food-stamp-law/> (noting that in spite of Storms’ claims that her proposed restriction on TANF withdrawals was necessary to combat abuse of the system, an audit of Florida EBT transactions found that less than one percent of transactions took place at liquor stores, strip clubs, bowling alleys, bars and bingo parlors).

201. See, e.g., Marion Nestle, *Do Food Stamps Need More Restrictions?*, THE ATLANTIC, Jun. 14, 2012, <http://www.theatlantic.com/health/archive/2012/06/do-food-stamps-need-more-restrictions/258493/> (“Anti-hunger advocates fear that any move to restrict benefits to healthier foods, or even to evaluate the current food choices of SNAP recipients, will make the program vulnerable to attacks and budget cuts.”).

discussed *cuts to benefits* as a possible policy response to evidence that obesity risk may be higher among certain groups of SNAP participants.<sup>202</sup>

#### *D. School Meal Programs*

Federal school meal programs originated in the 1930s. Early federal efforts focused on providing financial assistance to local school districts to hire workers to prepare and serve lunches in schools.<sup>203</sup> USDA got involved in 1935 and the emphasis shifted from job creation to subsidization of agriculture. USDA's Federal Surplus Commodities Corporation began purchasing surplus meat, dairy, and wheat products and donating them to needy families and schools.<sup>204</sup>

In 1946, Congress passed the National School Lunch Act to promote the "the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities."<sup>205</sup> The Act established the National School Lunch Program (NSLP) on a permanent basis.<sup>206</sup> To facilitate the program, the Secretary of Agriculture possessed authority to (1) supply schools with surplus food purchased as part of agricultural subsidy programs, (2) distribute funds to schools based on the number of program meals served, and (3) establish nutritional guidelines for meals served under the program.<sup>207</sup> Since 1966,<sup>208</sup> USDA

202. MICHELE VER PLOEG & KATHERINE RALSTON, USDA ECONOMIC RESEARCH SERVICE, FOOD STAMPS AND OBESITY: WHAT DO WE KNOW? 1, 25 (Mar. 2008) (noting that evidence regarding the connection between low-income status and obesity had "[led] policymakers and researchers to question whether the Food Stamp Program might have been too successful in boosting food consumption so that participants eat too many calories and gain weight" and referring to "reducing the overall benefit level" as a possible change in policy).

203. Gordon W. Grunderson, USDA Food and Nutrition Service, *The National School Lunch Program Background and Development*, [http://www.fns.usda.gov/cnd/lunch/AboutLunch/ProgramHistory\\_4.htm](http://www.fns.usda.gov/cnd/lunch/AboutLunch/ProgramHistory_4.htm) (last visited Mar. 4, 2013). This assistance was initially offered via the Civil Works Administration and the Federal Emergency Relief Administration and was aimed chiefly at job creation. It continued into the 1940s under the Works Projects Administration. *Id.*

204. *Id.* For a discussion of the ongoing role of commodities dumping in USDA-administered school meal programs, see J. Amy Dillard, *Sloppy Joe, Slop, Sloppy Joe: How USDA Commodities Dumping Ruined The National School Lunch Program*, 87 OR. L. REV. 221 (2008).

205. National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 230 (1946).

206. Grunderson, *supra* note 209.

207. *Id.*; See also 42 U.S.C.A. § 1758(a) (Supp. 1976) (describing the standards as they applied in 1976).

208. Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885 (1966).

has also supported the School Breakfast Program (SBP), made permanent by Congress in 1975.<sup>209</sup>

During the 1970s, USDA periodically promulgated updated nutritional standards for school meal programs to bring them closer to conforming to federal dietary guidelines.<sup>210</sup> But a major shift occurred in 1981, when Congress cut funding for school meal programs by 25% as part of the first Reagan budget.<sup>211</sup> The same year, USDA proposed regulations in light of the budget cuts that would have cut portion sizes and allowed schools to count ketchup and pickle relish toward the requirement for vegetable servings.<sup>212</sup> FRAC publicized the proposal—generating national controversy over “ketchup as a vegetable” that still resonates today—and the regulation was ultimately withdrawn.<sup>213</sup>

In 1994, Congress required for the first time that nutritional guidelines for the NSLP and SBP must be aligned with the Dietary Guidelines for Americans.<sup>214</sup> The change was prompted by a report finding that many school meals were dramatically inconsistent with the DGAs.<sup>215</sup> The following year, USDA issued new regulations instituting food-based menu planning—which effectively increased the quantities of fruits, vegetables, and whole grains required—and establishing specific minimum standards for key nutrients and calories.<sup>216</sup> These changes were quickly

---

209. National School Lunch Act and Child Nutrition Act of 1966 Amendments of 1975, Pub. L. No. 94-105, 89 Stat. 511 (1975).

210. For example, in the 1970s, USDA amended the definition of “milk” to allow participating schools to serve low-fat or skim milk alongside whole milk; 38 Fed. Reg. 21777, removed butter and fortified margarine as part of the school lunch meal pattern; 41 Fed. Reg. 23695, and required that school lunches provide one-third of the Recommended Dietary Allowances for X over the course of a week. Fed. Reg. 37166.

211. Food Stamp Act of 1977 Amendments of 1981, Pub. L. No. 97-35, 95 Stat. 358 (1981).

212. James C. Miller III, *The Early Days of Regan Regulatory Relief and Suggestions for OIRA's Future*, 63 ADMIN. L. REV. 93, 99 (2011) (describing withdrawal of “the ‘ketchup is a vegetable rule’ . . . by order of the President himself”).

213. See *id.*; FRAC, *supra* note 160.

214. Healthy Meals for Healthy Americans Act of 1994, Pub. L. No. 103-448, § 106(b), 108 Stat. 4699, 4702 (1994).

215. See JOHN BURGHARDT & BARBARA DEVANEY, USDA FOOD AND NUTRITION SERVICE, *THE SCHOOL NUTRITION DIETARY ASSESSMENT STUDY* (1993) (finding that NSLP and SBP meals did not meet recommendations for total fat and unsaturated fat, sodium, or carbohydrates).

216. National School Lunch Program and School Breakfast Program, 60 Fed. Reg. 31188 (June 13, 1995).

undone in 1996<sup>217</sup> by a Republican-controlled Congress seeking to give schools “flexibility to serve meals children will eat.”<sup>218</sup>

In 2004, Congress directed USDA to issue new guidance to state and local authorities “to increase the consumption of foods . . . that are recommended for increased serving consumption in the most recent Dietary Guidelines for Americans.”<sup>219</sup> But the Act was silent with regard to foods and ingredients recommended for reduced consumption, such as saturated fat and sodium. The Act also required school districts to develop local school wellness policies to promote healthy eating and physical activity.<sup>220</sup> The Act directed USDA, DHHS, and the Department of Education to provide technical assistance to state and local authorities with regard to establishing healthy school nutrition environments, reducing childhood obesity, and preventing diet-related chronic diseases.<sup>221</sup>

In 2008, the Institute of Medicine—an independent, non-profit organization that provides guidance on health-related matters—released a report produced at the request of USDA recommending sweeping changes to the nutritional guidelines for federal school meal programs.<sup>222</sup> Two years later, Congress passed The Healthy, Hunger-Free Kids Act (HHFKA), once again directing USDA to “establish standards [for school meal programs] that are consistent with the most recent Dietary Guidelines for Americans.”<sup>223</sup> The regulations specify requirements for fruit, vegetable, and whole-grain offerings and restrict saturated fat, cholesterol, and sodium in school meals.<sup>224</sup> Notably, the Act also provides for regulatory authority over foods sold to students outside of the meal programs.<sup>225</sup>

Implementation of stringent nutrition standards has proven politically difficult, however. Critics have expressed concerns about the increased

---

217. Healthy Meals for Children Act, Pub. L. No. 104-149, 110 Stat. 1379 (1996) (authorizing the use of the pre-1995 school meal pattern and any other “reasonable approach” to meal planning and prohibiting the Secretary of Agriculture from requiring a school to conduct or use nutrient analysis).

218. H.R. REP. NO. 104-561, at 4 (1996) (to accompany H.R. 2066).

219. Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, § 103, 118 Stat. 729, 732 (2004).

220. § 204, 118 Stat. at 780.

221. *Id.*

222. *See* INST. OF MED., NUTRITION STANDARDS AND MEAL REQUIREMENTS FOR NATIONAL LUNCH AND BREAKFAST PROGRAMS: PHASE I. PROPOSED APPROACH FOR RECOMMENDING REVISIONS (Dec. 2008).

223. 42 U.S.C. § 1779(b)(1)(C)(i) (2012).

224. 7 C.F.R. § 210.10(b)(3)(iii)-(iv) (2012).

225. 42 U.S.C. 1779(b)(1)(B) (applying agency regulations to “all foods sold [] outside the school meal programs, [] on the school campus; and [] at any time during the day”).



costs to schools,<sup>226</sup> wasted food,<sup>227</sup> and decreased participation in the school lunch program.<sup>228</sup> Lobbying around the HHFKA and USDA regulations has been substantial.<sup>229</sup> Two particularly contentious issues revolve around potatoes and tomatoes. One of the less funded but more vocal constituencies has been the National Potato Council, which has enlisted Sen. Susan Collins to be a spokesperson against the new regulations.<sup>230</sup> Considered a starchy vegetable, regulations sought to limit school servings to one cup per week. Though Agriculture Secretary Tom Vilsack described the regulation as supporting the consumption of other vegetables,<sup>231</sup> the Senate blocked the proposal by amending USDA's appropriations bill to prohibit the Department from setting "any maximum limits on the serving of vegetables in school meal programs."<sup>232</sup> The nutritional guidelines now indicate that additional servings of vegetables may be provided.<sup>233</sup>

Similarly, a regulation was proposed that would end tomato paste's long-standing privileged status. Tomato paste had been given more nutritional credit by volume than other vegetable pastes or purees, with one-eighth of a cup of paste counting as a half-cup of vegetables; all other

---

226. Isabelle Dills, *School lunches will be healthier, cost more*, NAPA VALLEY REGISTER (July 13, 2012, 8:00 PM), [http://napavalleyregister.com/news/local/school-lunches-will-be-healthier-cost-more/article\\_cb7b9226-cd4f-11e1-bfb1-001a4bcf887a.html](http://napavalleyregister.com/news/local/school-lunches-will-be-healthier-cost-more/article_cb7b9226-cd4f-11e1-bfb1-001a4bcf887a.html).

227. Lauren Ritchie, *Wasted school food will increase because of federal requirement*, ORLANDO SENTINEL (Feb. 22, 2012), [http://articles.orlandosentinel.com/2012-02-22/news/os-lk-lauren-ritchie-wasted-school-food-20120222\\_1\\_school-lunch-hunger-free-kids-act-lunch-ladies](http://articles.orlandosentinel.com/2012-02-22/news/os-lk-lauren-ritchie-wasted-school-food-20120222_1_school-lunch-hunger-free-kids-act-lunch-ladies).

228. Howard Fischer, *Legislation would allow public schools to end free lunches*, EAST VALLEY TRIBUNE, [http://www.eastvalleytribune.com/arizona/article\\_3b97e2dc-413a-11e1-a1d6-001871e3ce6c.html](http://www.eastvalleytribune.com/arizona/article_3b97e2dc-413a-11e1-a1d6-001871e3ce6c.html) (last updated Mar. 16, 2012, 6:20 PM).

229. See generally Lipsky & Thibodeau, *supra* note 40; see also Ron Nixon, *School Lunch Proposals Set Off a Dispute*, N.Y. TIMES (Nov. 1, 2011), [http://www.nytimes.com/2011/11/02/us/school-lunch-proposals-set-off-a-dispute.html?\\_r=2&pagewanted=1&adxnlnx=1320339603-Axm554brdl7zLs6wMBxWTQ](http://www.nytimes.com/2011/11/02/us/school-lunch-proposals-set-off-a-dispute.html?_r=2&pagewanted=1&adxnlnx=1320339603-Axm554brdl7zLs6wMBxWTQ).

230. Phil Galewitz, *Potato Lobby Turns Up The Heat In School Lunch Battle*, NPR (Oct. 6, 2011, 9:24 AM), <http://www.npr.org/blogs/thesalt/2011/10/05/141091119/potato-lobby-turns-up-the-heat-in-school-lunch-battle>.

231. *Id.*

232. Robert Pear, *Senate Saves the Potato on School Lunch Menus*, N.Y. TIMES (Oct. 18, 2011), <http://www.nytimes.com/2011/10/19/us/politics/potatoes-get-senate-protection-on-school-lunch-menus.html?ref=us>.

233. The regulation's footnote reads: "Larger amounts of these vegetables may be served." 7 C.F.R. § 210.10 n. c.

pastes and purees received credit only for the actual volume served.<sup>234</sup> The new regulations sought to close this special loophole for tomato paste, which allowed schools to satisfy their vegetable requirement by serving pizza.<sup>235</sup> The proposed rule was eventually prevented by the House agriculture appropriations bill,<sup>236</sup> and the final regulations indicate that “[a]ll vegetables are credited based on their volume as served, except that 1 cup of leafy greens counts as ½ cup of vegetables and tomato paste and puree are credited based on calculated volume of the whole food equivalency.”<sup>237</sup>

As of this writing, USDA was assessing nearly 250,000 comments submitted in response to the agencies proposed nutritional standards for foods sold to students outside of the school meal programs—through vending machines, snack bars, and a la carte meal lines.<sup>238</sup> Nutrition advocates have expressed concern that the proposed regulations leave open a loophole that would allow schools to serve unhealthy options like pizza and French fries on a daily basis in the a la carte line even though their inclusion in school meals that are part of the meal program would be more limited.<sup>239</sup> Advocates have also argued that the proposed regulations with regard to the sale of high-calorie, low-nutrient drinks to students don’t do

234. Jill U. Adams, ‘*Pizza vegetable*’ controversy is hot potato, L.A. TIMES (Nov. 28, 2011), <http://articles.latimes.com/2011/nov/28/health/la-he-school-lunch-nutrition-20111128>.

235. *Id.*

236. Allison Aubrey, *Pizza as a Vegetable? It Depends on the Sauce*, NPR (Nov. 15, 2011, 6:49 PM), <http://www.npr.org/blogs/thesalt/2011/11/15/142360146/pizza-as-a-vegetable-it-depends-on-the-sauce>. The republican controlled appropriations committee commented that the provisions were designed to “prevent overly burdensome and costly regulations” and to “provide greater flexibility for local school districts to improve the quality of meals in the [NSLP].” HOUSE APPROPRIATIONS COMMITTEE, SUMMARY: FISCAL YEAR 2012 APPROPRIATIONS “MINI-BUS” (Nov. 14, 2011), available at [http://appropriations.house.gov/uploadedfiles/11.14.11\\_minibus\\_-\\_detailed\\_summary.pdf](http://appropriations.house.gov/uploadedfiles/11.14.11_minibus_-_detailed_summary.pdf); Sarah Kiff, *No, Congress did not declare pizza a vegetable*, WONKBLOG (Nov. 21, 2011, 9:15 AM), [http://www.washingtonpost.com/blogs/ezra-klein/post/did-congress-declare-pizza-as-a-vegetable-not-exactly/2011/11/20/gIQABXgmhN\\_blog.html](http://www.washingtonpost.com/blogs/ezra-klein/post/did-congress-declare-pizza-as-a-vegetable-not-exactly/2011/11/20/gIQABXgmhN_blog.html) (arguing a smaller serving of tomato paste is comparable in nutritional value to a larger portion of fruits such as apples or oranges).

237. 7 C.F.R. § 210.10(c)(2)(iii) (2012).

238. Nirvi Shah, *USDA Sifts Comments on School Vending Machines, ‘A La Carte’ Items*, EDUCATION WEEK (April 19, 2013) at <http://www.edweek.org/ew/articles/2013/04/18/29vending.h32.html>; USDA Food and Nutrition Service, National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010, available at <http://www.fns.usda.gov/cga/020113-snacks.pdf>.

239. See Shah, *supra* note 246.

enough to restrict beverages that are a major contributor to childhood obesity.<sup>240</sup>

#### IV. Conclusion: Toward the Further Development of the Health in All Policies Principle

The task of reorienting USDA nutrition and agricultural programs in light of public health goals is daunting and far from finished, but the story of USDA program reform to date is an impressive and instructive one. Political scientists who studied USDA in the 1950s and 60s found that it

epitomized an ‘iron triangle’ bureaucracy. It had close relationships with the agriculture committees in Congress and with the many interest groups representing farmers. The three sides of the triangle worked together in harmony behind the scenes to formulate national agricultural policy. There were many mutual interests: sizeable profits and reduction of market risks for farmers, reelection of farm-state congressmen, and growing budgets and responsibilities for the Department of Agriculture. Common interests and frequent contact among the major participants—career USDA bureaucrats, political appointees in the department, congressmen, staffers on the agriculture committees, and lobbyists—made for comfortable and effective working relationships. Indeed, the actors seemed interchangeable as many moved from one corner of the triangle to another.<sup>241</sup>

In the late 1960s and 1970s, public interest groups in the areas of environmental protection, consumer affairs, and nutrition, played an important role in weakening the strength of the iron triangle of agricultural policymaking.<sup>242</sup> Public health groups—which have been fairly late to the party—joined this loose coalition during 2008 and 2012 farm bill negotiations that broke down divisions among silos focusing on public health, organic farming, and environmental conservation. But mounting tension between public health and anti-hunger groups over SNAP restriction proposals threatens to alienate key players like FRAC, whose track record on USDA reform is far more impressive than that of any public health group.

---

240. See Shah, *supra* note 246.

241. Berry, *supra* note 154.

242. *Id.*

In light of the disconnect between public health aims and USDA's mandated commitment to expanding agricultural markets, some commentators have proposed that nutrition programs should be removed from USDA's purview altogether.<sup>243</sup> Other advocates have sought to use Health Impact Assessments to influence USDA decision-making with regard to nutrition programs.<sup>244</sup> But both of these approaches fail to give due credit to the success of coalitions among public health, environmental, anti-hunger groups, and others in exerting external pressure on Congress and the administration, including through resort to litigation in the courts.

The USDA case study points to the need for further development of the HiAP principle and the various administrative law tools that might be used to advance its goals. HIAs are, after all, merely a "decision-support tool"— "intended to support decision-making in choosing between options" by "predicting the future consequences of implementing different options."<sup>245</sup> Although a requirement that an agency or other body must conduct HIAs can be imposed by an external authority (as is the case, for example, in the European Community under the 1997 Amsterdam Treaty), their operation is primarily focused on an *internal*, process-based consideration of health impacts. By contrast, the history of health-focused reform of USDA programs suggests that other approaches (lobbying the legislature for substantive mandates directing an agency to promulgate rules with health goals in mind, bringing litigation against the agency to force compliance with statutory mandates or restrictions) might be equally, if not more effective.

The current controversy over restrictions on SNAP benefits points to a potential problem with emphasis on HIAs. By narrowing the focus of

---

243. See, e.g., Dillard, *supra* note 210, at 251 ("As a first step, the NSLP should be taken away from USDA control and moved to a suitable agency like the Department of Education or Health and Human Services. The Secretary of Agriculture, whose primary responsibility is to support farmers and ensure food safety should not attempt to oversee the health and well-being of schoolchildren.").

244. See, e.g., Health Impact Project, Supplemental Nutrition Assistance Program HIA, <http://www.healthimpactproject.org/hia/us/supplemental-nutrition-assistance-program-hia> (last visited Apr. 7, 2013) (describing an ongoing project whereby the Illinois Public Health Institute will conduct a Health Impact Assessment to "inform the Illinois General Assembly's deliberations on legislative proposals to seek a waiver from USDA to ban the use of Supplemental Nutrition Assistance Program (SNAP) benefits for purchasing sugar-sweetened beverages"); Health Impact Project, Initial Findings: Health Impact Assessment of the Supplemental Nutrition Assistance Program, <http://www.healthimpactproject.org/resources/body/Health-Impact-Project-Farm-Bill-SNAP-HIA-Initial-Findings-01-23-13.PDF> (last visited Apr. 7, 2013).

245. European Observatory on Health Systems and Policies, *The Effectiveness of Health Impact Assessment*, at xix (Matthias Wismar et al. eds., 2007), available at [http://www.euro.who.int/\\_data/assets/pdf\\_file/0003/98283/E90794.pdf](http://www.euro.who.int/_data/assets/pdf_file/0003/98283/E90794.pdf).

policymaking on health risks and benefits, the HIA process may actually threaten cross-sector coalition building efforts. In using HIAs to assess proposals to restrict the use of SNAP benefits for the purchase of sugar-sweetened beverages, for example, one public health organization is conducting

a balanced, science-driven assessment of the potential health benefits—such as a lower risk of obesity, tooth decay, and diabetes—and risks, including reduced participation in SNAP by eligible families, hunger, mental health impacts related to social exclusion and restriction of freedom of choice, and the potential for such policies to add to the stigma associated with SNAP participation.<sup>246</sup>

This approach, while well intentioned and perhaps quite valuable, might threaten coalitions between public health groups and anti-hunger groups. It takes the concerns of anti-hunger groups (about stigma, restriction of choice, and social exclusion) into account, but only insofar as they can be articulated as health risks, an approach that may not resonate with groups that view dignity and liberty concerns as paramount. As a concrete tool for implementing the HiAP approach, HIAs have their place. But their narrowness cannot be overlooked. The broader HiAP principle is deserving of more attention from legal scholars and advocates interested in furthering the translation of the ecological model of public health into action. It provides an imminently useful framework for public interest advocates seeking to leverage health concerns in their efforts to reform programs in a wide range of sectors using a variety of legal tools.

---

246. See, e.g., Health Impact Project, *supra* note 252.

# UNITED STATES FOOD LAW UPDATE: SHROUDED BY ELECTION-YEAR POLITICS, STATE INITIATIVES AND PRIVATE LAWSUITS FILL IN THE GAPS CREATED BY CONGRESSIONAL AND AGENCY OSSIFICATION

*A. Bryan Endres,\* Lisa R. Schlessinger\*\* & Rachel Armstrong\*\*\**

I. Introduction.....	100
II. Food Marketing.....	101
A. <i>Food Bans</i> .....	101
1. Obesity.....	101
2. Environmental Conservation and Ethics.....	105
B. <i>Natural Foods</i> .....	109
1. What is Natural?.....	109
2. Are Products Containing Genetically Engineered Ingredients “All Natural?”.....	110
3. How much processing is “too much” for “Natural” Food?.....	111
C. <i>Rebranding High Fructose Corn Syrup</i> .....	113
D. <i>Mandatory Labeling for Genetically Modified Organisms</i> .....	115
III. Animal Production and Labeling Issues.....	117
A. <i>Citizen and Advocacy Involvement in Long Running         Dispute with FDA over Withdrawal of Subtherapeutic         Use of Penicillin and Tetracyclines</i> .....	118
B. <i>Consumer Outcry Against LFBT Results in Purchasing         Changes and Labeling Initiatives</i> .....	122
1. Food Libel.....	123
2. Undercover Recovery and Ag Gag Legislation.....	126
C. <i>Egg Industry and Citizen Group Agreement Reaches         Congress; FDA Implements Salmonella Testing Rule</i> .....	128
D. <i>Supreme Court Invalidates California’s “Downer”</i>	

---

\* Associate Professor of Agricultural Law, Department of Agricultural and Consumer Economics, and Director, European Union Center, University of Illinois. This research was supported in-part by the USDA National Institute of Food and Agriculture, Hatch Project No. ILLU-470-309. Any opinions, findings, and conclusions or recommendations expressed in this publication are those of the authors and do not necessarily reflect the view of the funding agency.

\*\* Postdoctoral Research Associate, University of Illinois.

\*\*\* Postdoctoral Research Associate, University of Illinois and Executive Director, Farm Commons.

*Animal Slaughter Law*.....130

E. *WTO Dealings Affect Labeling and Production Issues*.....132

IV. *Concluding Thoughts*.....134

I. Introduction

Observers of food law in the 2012 presidential election year witnessed a dramatic slowing of federal initiatives—perhaps arising from a desire by both Congress and the administration to avoid upsetting critical constituent groups during a year seemingly dominated by campaigns and endless talking points. For example, Congress failed to take action on a unique compromise between what some had considered mortal enemies—the Humane Society of the United States and United Egg Producers—that would implement a federal animal welfare standard for laying hens in return for abandoning ballot measures in various states. Similarly, the FDA waited until the early days of 2013 to issue the proposed rules implementing the FDA Food Safety Modernization Act.<sup>1</sup> Recall that Congress passed this landmark statute not in 2012, but January of 2011.<sup>2</sup> Despite this apparent reluctance to tackle some big issues in 2012, the FDA did decide two significant food law issues: a refusal of a request seeking to rebrand high fructose corn syrup as “corn sugar,” as well as promulgation of a long overdue rule on salmonella testing in shell egg production.

State and local governments, on the other hand, were exceptionally active, generating substantial changes in several food law issues ranging from outright bans on certain food products (or quantities of food as in the New York City ban on large volume sugary drinks) to animal protection initiatives. Not to be left out of the fray, various non-governmental organizations and other plaintiffs filed a string of lawsuits challenging use of the term “natural” in a variety of contexts.

As in previous editions of this update, necessity dictates that not every change is included; rather, the authors limited their analysis to significant changes within the broader context of food production, distribution, and retail. The intent behind this series of updates is to provide a starting point

---

1. The FDA issued two proposed regulations to implement the Food Safety Modernization Act’s amendments to the Food, Drug, and Cosmetic Act. See FDA, *Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventative Controls for Human Food*, 78 Fed. Reg. 3646 (Jan. 16, 2013); FDA, *Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption*, 78 Fed. Reg. 3504 (Jan. 16, 2013).

2. FDA Food Safety Modernization Act, Pub. L. 111–353, 124 Stat. 3885 (Jan. 4, 2011).

for scholars, practitioners, food scientists, and policy makers determined to understand the shaping of food law in modern society. Tracing the development of food law through these updates also builds an important historical context for the overall progression of the discipline and hopefully prompts further scholarship by others on many of these emerging issues.

## II. Food Marketing

### A. *Food Bans*

Food bans are a common tool to prevent harm to consumers. Although the results for each ban may be the same—prohibiting the consumer from purchasing the item—underlying rationales for bans vary. For example, federal and state governments ban foods harmful to human health (i.e., adulterated food) under their respective versions of the Food, Drug, and Cosmetic Act.<sup>3</sup> Intended to protect the public from dangerous contaminants, consumers generally support bans of this nature. Other motivations for restricting access to certain foods, however, may result in significant push back from consumers and vendors. In 2012, efforts to combat obesity, as well as environmental conservation and ethics, led to various food bans that engendered significant controversy. We discuss some of these developments below.

#### 1. Obesity

In the United States, recent studies found that more than one-third of the adult population (37.5%) is obese.<sup>4</sup> Linked to heart disease, stroke, diabetes and certain types of cancer, medical costs associated with obesity were \$147 billion per year in 2008, the latest data available.<sup>5</sup> This epidemic is not limited to adults. Since the 1980s, the number of obese children has tripled, with approximately seventeen percent of children in the U.S. currently classified as obese.<sup>6</sup> New York City (NYC) is acutely aware of the obesity issue, with more than fifty percent of its adult population overweight or obese, and more than twenty percent of children in

---

3. See, e.g., 21 U.S.C. § 342 (2012) (Federal Food, Drug, and Cosmetic Act); 410 ILL. COMP. STAT. 620 (2012) (Illinois Food, Drug and Cosmetic Act).

4. CDC, Adult Obesity Facts, <http://www.cdc.gov/obesity/data/adult.html> (last visited Mar. 25, 2013).

5. *Id.*

6. CDC, Childhood Data and Statistics, <http://www.cdc.gov/obesity/data/childhood.html> (last visited Mar. 25, 2013).



kindergarten through eighth grade overweight or obese.<sup>7</sup> As this epidemic expands, governments such as NYC are exploring regulatory options to reduce a problem that is costing society billions a year in health care expenditures. Perhaps unsurprisingly in light of the above statistics, 2012 was a busy year for NYC government in its attempts to ban foods and incentives it deemed partly responsible for the obesity epidemic in its city, specifically targeting large sugary drinks and incentives marketed to children.

After successfully banning trans fats from foods in 2007, the New York City Board of Health set its sights on large sugary drinks. Americans consume 200-300 more calories daily than in the past, and experts largely attribute the increase to consumption of sugary drinks.<sup>8</sup> These drinks also are responsible for the largest source of added sugar in an American's diet.<sup>9</sup> In addition to an increased risk of heart disease and diabetes, health advocates associate sugary drinks with long-term weight gain for both adults and children.<sup>10</sup> The numbers show that New Yorkers are consuming excessive quantities of sugary drinks. Thirty percent of adults in NYC report drinking one or more sugary drinks a day, forty-four percent of children aged six to twelve consume more than one sugary drink a day, and twenty-six percent of high school students admitted to drinking two or more sugary drinks per day.<sup>11</sup>

It is not just consumption of sugary drinks that is on the rise; serving sizes also keep increasing, which leads to more calorie consumption. The portion size of fountain drinks at many restaurants has increased from seven to thirty-two fluid ounces since 1955—an increase of 457%.<sup>12</sup> Other restaurants in NYC offer sugary drinks up to sixty-four fluid ounces, which can contain up to 780 calories, fifty-four teaspoons of sugar, and no nutritional value.<sup>13</sup>

---

7. Centers for Disease Control and Prevention. *Obesity in K-8 students – New York City, 2006-07 to 2010-11 School Years*, Morbidity and Mortality Weekly Report 2011; 60(49): 1673-78, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6049a1.htm>.

8. Eric A. Finkelstein, Christopher Ruhm, & Katherine M. Kosa, *Economic Causes and Consequences of Obesity*, 26 ANN. REV. OF PUB. HEALTH 239, 242 (2005).

9. Joanne F. Guthrie & Joan F. Morton, *Food Sources of Added Sweeteners in the Diets of Americans*, 100 J. AM. DIETETIC ASS'N 43, 44 (2000).

10. N.Y. CITY HEALTH CODE § 81.53 (2012), available at <http://www.nyc.gov/html/nycrules/downloads/rules/F-DOHMH-09-13-12-a.pdf>.

11. *Id.*

12. Lisa R. Young & Marion Nestle, *Portion Sizes and Obesity: Responses of Fast Food Companies*, 28 J. OF PUB. HEALTH POL'Y 238, 244 (2007).

13. N.Y. CITY HEALTH CODE § 81.53 (2012), available at <http://www.nyc.gov/html/nycrules/downloads/rules/F-DOHMH-09-13-12-a.pdf>.

In response to the above information, the New York City Board of Health adopted Mayor Michael Bloomberg's recommendation to establish a maximum serving size of sixteen ounces for sugary, non-alcoholic drinks sold at local food establishments.<sup>14</sup> The Board voted 8-0 to amend Article 81 of the NY City Health Code to place a size restriction on any sweetened beverage containing more than twenty-five calories per eight ounces and all self-service cups offered by food vendors.<sup>15</sup> The Ban goes into effect on March 13, 2013 and applies to restaurants, mobile food carts, delis, theater and stadium concessions, and any other establishment regulated by the city's Department of Health and Mental Hygiene.<sup>16</sup> The City is hoping that reducing the amount of sugary drinks consumed by its residents will combat obesity and the associated diseases.<sup>17</sup>

The sugary drink ban has created major controversy over the government's involvement in what people consume, and a group called New Yorkers for Beverage Choices announced plans to challenge the ban in court, citing the negative impact on small business owners and other companies.<sup>18</sup> From a legal perspective, food bans are generally based on the broad police power of the sovereign.<sup>19</sup> Opponents argue that these anti-obesity bans are paternalistic and unjustified.<sup>20</sup> Moreover, as the ban only restricts food service establishments (FSEs), owners of FSEs are quick to point out the unfair disparity in treatment between FSEs and other

---

14. *Id.* See also Mayor Bloomberg, Deputy Mayor Gibbs, Health Commissioner Farelly and Bruce Ratner Announce Barclays Center will Voluntarily Adopt Regulations to Limit Size of Sugary Beverages, NEWS FROM THE BLUE ROOM, [http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor\\_press\\_release&catID=1194&doc\\_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2012b%2Fpr326-12.html&cc=unused1978&rc=1194&ndi=1](http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2012b%2Fpr326-12.html&cc=unused1978&rc=1194&ndi=1) (last visited Feb. 25, 2013).

15. See Mayor Bloomberg, *supra* note 14.

16. N.Y. CITY HEALTH CODE § 81.53 (2012).

17. *Id.*

18. NEW YORKERS FOR BEVERAGE CHOICES, <http://nycbeveragechoices.com/> (last visited Mar. 25, 2013).

19. Alison Peck, *Revisiting the Original "Tea Party": The Historical Roots of Regulating Food Consumption in America*, 80 UMKC L. REV. 1, 6 (2011). As this article went to press, Judge Tingling of the Supreme Court of New York enjoined enforcement of the ban, finding it arbitrary and capricious. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. NYC Dept. of Health & Mental Hygiene*, No. 653584/12 (N.Y. App. Div., order entered March 11, 2013). The Appellate Division of the NY Supreme Court has agreed to hear the case in June 2013. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. NYC Dept. of Health & Mental Hygiene*, No. 653584/12 (N.Y. App. Div., filed March 12, 2013).

20. Stephanie A. McGuinness, *Time to Cut the Fat: The Case for Government Anti-Obesity Legislation*, 25 J.L. & HEALTH 41, 51 (2012).

establishments, such as grocery stores. For example, under the ban, a pizzeria will not be able to sell a two-liter bottle of Coke, but a corner deli, which is regulated as a market rather than restaurant, can.<sup>21</sup> As a result, FSEs complain that the new ban will hurt them economically. In January of 2013, the American Beverage Association, the NACCP and the Hispanic Federation filed a lawsuit against NYC claiming the Board of Health overstepped its power, and that the ban will disproportionately hurt small, minority owned businesses.<sup>22</sup>

In addition to banning large sugary drinks, the state of New York took issue against incentives (toys) associated with unhealthy food marketed to children. Specifically, the state proposed nutrition standards for restaurants that distribute incentive items aimed at children. As previously detailed, the obesity rates in children continue to rise and various jurisdictions believe breaking the link between toys and unhealthy foods will reduce the growing problem of childhood obesity. Accordingly, governments are banning toys provided with kids' meals if the meals do not meet specified nutritional requirements.<sup>23</sup>

New York State Senate Bill S7849-2011 would require fast food restaurants offering incentive items with children's meals to meet certain nutritional guidelines.<sup>24</sup> The guidelines limit the amount of fat, sugar, calories and sodium allowed per meal. If a meal intended for children falls outside of the guidelines, the restaurant will be forced to remove the incentive item. The proposed law defines an incentive item to include: "any toy, game, trading card, admission ticket or other consumer product, whether physical or digital, with particular appeal to children."<sup>25</sup>

San Francisco and Santa Clara, California passed similar legislation, but entrepreneurial restaurants such as McDonald's quickly found a loophole by selling the "banned" toy for an additional ten cents.<sup>26</sup> In response, the New York bill attempts to remove the potential loophole by stating, "a restaurant may offer an incentive item in combination with the

---

21. CBS NEW YORK, *New York City Lawyers, Beverage Industry Duel in Court Over Big Drink Ban*, <http://newyork.cbslocal.com/2013/01/23/nyc-sugary-drink-ban-faces-first-court-test-as-opponents-question-racial-fairness/> (last visited Feb. 25, 2013).

22. Amicus brief available at <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=HmpJnyM8YRflz8GAzk9vHw==&system=prod>.

23. Alexis M. Etow, *No Toy For You! The Healthy Food Incentives Ordinance: Paternalism or Consumer Protection*, 61 AM. U. L. REV. 1503 (2012).

24. N.Y. S. Res. 7849 (2011), available at <http://open.nysenate.gov/legislation/bill/S7849-2011>.

25. *Id.*

26. Etow, *supra* note 23, at 1536.

purchase of a meal, food item, or beverage, only if the meal, food item, or beverage, meets nutritional standards.”<sup>27</sup>

At the federal level, several agencies are exploring options to reduce negative impacts from the \$1.6 Billion spent annually on food ads targeting children through television commercials, social media, cell phones, and computer-based food company-branded online games.<sup>28</sup> The 2009 Omnibus Appropriations Act created the Interagency Working Group on Food Marketed to Children. Comprised of representatives from the FDA, FTC, USDA, and CDC, the Working Group’s mission is to recommend standards for advertising food to children. The Working Group issued a Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts<sup>29</sup> in 2011. The proposed guidelines were met with strong opposition from food, advertising and media companies for being overly restrictive and generally inappropriate.<sup>30</sup> Additionally, various legal challenges based on First Amendment rights have stalled government regulation of food advertising targeted at children.<sup>31</sup> Although in March 2012, FTC Chairman Jon Leibowitz indicated to Congress that the Commission did not support restricting food advertising to children; the agency, in September, announced that it intended to issue a report by the end of the year detailing food industry marketing practices directed at children.<sup>32</sup> As of this writing, the FTC has not released the report.

## 2. Environmental Conservation and Ethics

At the urging of various conservationist and animal rights groups, legislatures also implemented several bans on foods. In 2012, various states banned shark fins, and California banned *foie gras*.<sup>33</sup> By way of

---

27. N.Y. S. Res. 7849.

28. Bernice Young, *US Guidelines on Food Marketing to Kids Stalls*, CALIFORNIA WATCH, (Jan. 27, 2012), <http://californiawatch.org/dailyreport/us-guidelines-food-marketing-kids-stalls-14648>.

29. *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts*, Interagency Working Group on Food Marketed to Children, *available at* <http://ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>.

30. *US Guidelines on Food Marketing to Kids Stalls*, CALIFORNIA WATCH, <http://californiawatch.org/dailyreport/us-guidelines-food-marketing-kids-stalls-14648> (last visited Mar. 28, 2013).

31. *Id.*

32. *Food Industry Braces for New Study on Marketing to Kids*, ABC WORLD NEWS, <http://abcnews.go.com/blogs/business/2012/09/food-industry-braces-for-new-study-on-marketing-to-kids/> (last visited Mar. 28, 2013).

33. States with shark fin bans include Washington (WASH. REV. CODE § 77.15.770 (2012)), Oregon (OR. REV. STAT. § 509.160 (2012)), California (CAL. FISH & GAME CODE § 2021 (2012)), Hawaii (Haw. Rev. Stat. § 188-40.7 (2012)), and Illinois

background, *Foie gras* involves the forced overfeeding of geese or ducks in order to produce an exceptionally fatty liver that is eaten as a delicacy.<sup>34</sup> Shark Finning is an incredibly wasteful, but lucrative industry that uses five percent of the shark carcass (the fin) in order to make a traditional Chinese ceremonial soup. The practice has caused shark populations to dwindle worldwide.<sup>35</sup>

*Foie gras* bans are entrenched in arguments that the production process is inhumane. In order to make *foie gras*, huge amounts of food must be pumped into the stomachs of ducks and geese twice a day in order to obtain the fatty liver.<sup>36</sup> The process enlarges the birds' livers six to ten times their natural size.<sup>37</sup> The force-feeding lasts between twelve and thirty-one days, at which point the birds are slaughtered.<sup>38</sup> Animal rights groups claim the force-feeding results in painful cuts in the birds' throats and can rupture digestive tracts.<sup>39</sup> Currently, *foie gras* is only produced in two states, New York and California, but consumed nation-wide.<sup>40</sup> The debate over force-feeding birds has produced a fight with no middle ground—one side claiming the right to produce and consume the delicacy and the other claiming the process is inhumane and produces an unnecessary product.<sup>41</sup>

On July 1, 2012, California's ban on the production and sale of any product resulting from the force-feeding of a bird for the purpose of enlarging its liver beyond the normal size went into effect.<sup>42</sup> The law was

---

(Illinois Public Act 97-0733). Shark fin bans have been considered in both New Jersey (proposed shark fin ban bill S1764 and A2719) and Maryland (proposed shark fin ban bill S.B. 465 and H.B. 393). California's *foie gras* ban is currently the only ban in the country (CAL. HEALTH & SAFETY CODE §§ 25980-25984 (2012)).

34. Kristin Cook, *The Inhumanity of Foie Gras Production—Perhaps California and Chicago Have the Right Idea*, 2 J. ANIMAL L. & ETHICS 263 (2007).

35. Andrew Nowell Porter, *Unraveling the Ocean from the Apex Down: The Role of the United States in Overcoming Obstacles to an International Shark Finning Moratorium*, 35 SPG ENVIRONS ENVTL. L. & POL'Y J. 231, 233-34 (Spring 2012).

36. Cook, *supra* note 34, at 264.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Joshua I. Grant, *Hell to the Sound of Trumpets: Why Chicago's Ban on Foie Gras was Constitutional and What it Means for the Future of Animal Welfare Laws*, 2 STAN. J. ANIMAL L. & POL'Y 52, 55 (2009).

42. CAL. HEALTH & SAFETY CODE §§ 25980-25984 (2012), available at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=hsc&group=25001-26000&file=25980-25984>. See also *California's Foie Gras Ban Goes Into Effect*, ABC WORLD NEWS, <http://abcnews.go.com/US/californias-foie-gras-ban-effect/story?id=16687059#>. UNtYiVE2f3A (last visited Mar. 27, 2013).

initially passed in 2004, but had an eight-year delay before its effective date.<sup>43</sup> Not long after, a group of *foie gras* producers and restaurateurs filed a lawsuit in the United States District Court for the Central District of California. The suit claimed that the California law was unconstitutionally vague because the law does not provide fair notice of exactly what amount of food to feed a bird would be acceptable.<sup>44</sup> The Court denied the producer's request for an injunction.<sup>45</sup>

Despite the failures in court, California restaurateurs have found creative ways around the state's *foie gras* ban. The managers of the Presidio Social Club, a restaurant located in a federal enclave within San Francisco, offer *foie gras* at the restaurant by claiming the law does not apply to them because the restaurant is on land administered by a federal agency.<sup>46</sup> Across the state, other restaurateurs and chefs are using loopholes such as offering *foie gras* free with other orders, or preparing it for customers who bring their own *foie gras* to the restaurant.<sup>47</sup>

In 2006, Chicago, based on its police power to ensure the general, health, safety and welfare of its citizens, banned the sale of *foie gras*, which was met with anger from chefs, restaurant-goers and other enthusiasts.<sup>48</sup> Two years later, by a vote of 37 to 6, the Chicago City Council repealed the ban.<sup>49</sup> Influential Mayor, Richard Daley, at one point criticized the ban as "the silliest law" the City Council had ever passed.<sup>50</sup> Supporters of the repeal claimed the original ordinance brought negative attention to Chicago, was an embarrassment to the city, and infringed on citizen's freedom of choice.<sup>51</sup> The repeal occurred despite a finding by the United States District Court in the Northern Division of Illinois that the regulation did not violate the Constitution.<sup>52</sup> It will be interesting in future years to see if California courts follow the reasoning employed in the Illinois challenge,

---

43. Cook, *supra* note 34, at 270.

44. Association des Éleveurs de Conards et d'Oies du Québec v. Harris, No. 12-5735 (U.S. Dist. Ct., C.D. Cal., W. Div., orders entered July 19, 2012 and Sept. 19, 2012).

45. *Id.*

46. Fenit Nirappil, *Foie Gras Ban: California Restaurants Duck New Law in Creative Ways*, HUFFINGTON POST, (July 17, 2012), [http://www.huffingtonpost.com/2012/07/17/foie-gras-ban\\_n\\_1680200.html](http://www.huffingtonpost.com/2012/07/17/foie-gras-ban_n_1680200.html).

47. *Id.*

48. Grant, *supra* note 41, at 66.

49. Nick Fox, *Chicago Overturns Foie Gras Ban*, N.Y. TIMES, (May 14, 2008), <http://dinersjournal.blogs.nytimes.com/2008/05/14/chicago-overturns-foie-gras-ban/>.

50. Grant, *supra* note 41, at 67.

51. *Id.*

52. Illinois Restaurant Ass'n v. City of Chicago, 492 F. Supp. 2d 891 (N.D. Ill. 2007).

as well as if the ban will survive political pressure similar to that brought on the Chicago City Council.

Also in California, organizations that represent the interests of Asian Americans challenged the constitutionality of legislation that bans the “possession, sale, offer for sale, distribution, or trade of shark fins.”<sup>53</sup> The challenge claims that the law violates their equal protection rights, unlawfully interferes with interstate commerce, preempts federal law, and violates 42 U.S.C. § 1983.<sup>54</sup> Additionally, the group argues that the law deprives them of rights, privileges and immunities under the U.S. Constitution.<sup>55</sup>

Some in the Chinese-American community use shark fins as a traditional soup—often used as a ceremonial centerpiece of banquets and served at weddings and birthdays of elders. The soup is a symbol of respect, honor and appreciation in Chinese culture.<sup>56</sup> The suit alleges that the ban on shark fins discriminates against people of Chinese national origin and the plaintiffs seek a declaration that the law is unenforceable and void.<sup>57</sup>

The Illinois legislature passed a similar ban, effective January 1, 2013.<sup>58</sup> The Illinois statute prohibits the possession, sale, offer for sale, trade or distribution of a shark fin on or after January 1, 2013.<sup>59</sup> Persons already in possession of a shark fin as of January 1, 2013 have until July 1, 2013 to dispose of the shark fin.<sup>60</sup>

The bans on possession of shark fins arise after a national effort to outlaw the practice of shark finning. Because shark meat is relatively inexpensive compared to other fish, such as tuna, fishermen do not want to waste precious cargo space by holding the entire shark carcass when the only lucrative portion is then fin.<sup>61</sup> Generally, when harvesting a shark fin, the fisher will cut the fins and tail off before throwing the animal back into the water to die.<sup>62</sup> The high price that shark fins can bring at market has led to a boom in the shark finning industry, and has resulted in a sharp decline in the shark population, including placing some species on the verge of

---

53. *Chinatown Neighborhood Assn. v. Brown*, No. 12-3759, 2013 WL 60919, at \*1-3 (U.S. Dist. Ct., N.D. Cal., San Francisco Div., filed July 18, 2012).

54. *Id.* at \*3.

55. *Id.*

56. *Id.* at \*1.

57. *Id.*

58. Ill. Pub. Act 97-0733 (2013).

59. *Id.*

60. *Id.*

61. Porter, *supra* note 35.

62. *Id.* at 233

extinction.<sup>63</sup> Depending on the size of the fin, prices generally exceed sixty dollars per kilogram, but can range in price up to seven hundred dollars.<sup>64</sup> In 2010, the federal government passed the Shark Conservation Act of 2010, which made it illegal for fisherman in any United States' water to keep only the shark's fin without also carrying the carcass on the ship.<sup>65</sup> This new round of bans, by impacting product demand via outlawing possession, seeks to indirectly reduce shark finning practices. However, while the federal act bans the practice amongst all fishermen, the new laws restricting possession only effect populations that consume shark fins, giving the organizations that filed on behalf of Asian-American's potentially solid arguments for their claims.

### *B. Natural Foods*

#### 1. What is Natural?

Natural is the most commonly used claim on new U.S. food products.<sup>66</sup> In 2009, approximately 55,000 products had the term natural on their label, and that number continues to rise.<sup>67</sup> Consumers have driven the trend; sixty-three percent of people who responded to a survey show preference for a product labeled natural.<sup>68</sup> The FDA has retained a policy statement about the term natural, but has continually refused to define the term with an official rule.<sup>69</sup> FDA reluctance to promulgate a firm definition

---

63. *Id.* at 234.

64. *Id.* at 237.

65. 16 U.S.C. § 1857(1)(P)(i)-(iv) (2012).

66. Erik Benny, "Natural" Modifications: The FDA's Need to Promulgate an Official Definition of "Natural" that Includes Genetically Modified Organisms, 80 GEO. WASH. L. REV. 1504, 1506 (2012).

67. Adam C. Schlosser, *A Healthy Diet of Preemption: The Power of the FDA and the Battle Over Restricting High Fructose Corn Syrup from Food and Beverages Labeled "Natural,"* 5 J. FOOD L. & POL'Y 145, 167 (2009).

68. GreenerChoices.Org & Consumer Reports, Food Labeling Poll 9 (July 11, 2007), available at [http://greenerchoices.org/pdf/Food%20Labeling%20Poll-final\\_rev.pdf](http://greenerchoices.org/pdf/Food%20Labeling%20Poll-final_rev.pdf).

69. In contrast, the USDA has defined and regulates the use of the term natural in meat products. USDA, Meat and Poultry Labeling Terms, [http://www.fsis.usda.gov/FACTSheets/Meat\\_&\\_Poultry\\_Labeling\\_Terms/index.asp#14](http://www.fsis.usda.gov/FACTSheets/Meat_&_Poultry_Labeling_Terms/index.asp#14) (last visited Feb. 26, 2013). In a relatively straightforward class action suit filed against Chipotle in June 2012, plaintiffs alleged that the company fraudulently misrepresented the exclusive use of naturally raised meat on their menu. *Hernandez v. Chipotle Mexican Grill, Inc.*, No 12-5543 (U.S. Dist. Ct., C.D. Cal., filed June 26, 2012). The court denied Chipotle's motion to dismiss, holding that the plaintiff need not show actual consumption of any non-naturally raised meat because the alleged harm was paying a premium based on Chipotle's representations that non-naturally raised meat was not used at the restaurant



has led to ample private and class action litigation over “natural” claims on a variety of processed, multi-ingredient food products.<sup>70</sup> While the FDA policy statement generally protects producers at the federal level, multiple consumer groups have relied upon state consumer protection statutes to bring claims for deceptive and misleading use of the term “natural” on various products.<sup>71</sup> This trend towards litigation over claim of a product’s natural characteristics is unlikely to end so long as (1) the FDA does not issue a bright line rule of the definition of natural and (2) consumers continue to be drawn to products making the natural claim.<sup>72</sup> In the interim, judges, on a case-by-case basis, will continue to craft what amounts to a confusing, piecemeal, state-by-state construction of what may qualify as a “natural” product.<sup>73</sup> While this Article features a sampling of what the authors consider are the most important cases filed this year, space constraints prevented the authors from describing several others.<sup>74</sup>

## 2. Are Products Containing Genetically Engineered Ingredients “All Natural”?

Historically, cases filed over the definition of natural involved food and beverages that contained high fructose corn syrup.<sup>75</sup> One novel issue in 2012 was whether or not genetically engineered ingredients warrant listing as a natural ingredient. Genetically modified organisms (GMOs) account for most of the United States’ staple crops, including soybeans, corn, cotton, canola, and sugar beets.<sup>76</sup> From a production perspective, many farmers appreciate the insect and herbicide resistance embedded in

---

chain. *Id.* The court also refused to dismiss the plaintiff’s claim for fraudulent concealment, as well as the class allegations. *Id.*

70. April L. Farris, *The “Natural” Aversion: The FDA’s Reluctance to Define a Leading Food-Industry Marketing Claim, and the Pressing Need for a Workable Rule*, 65 FOOD & DRUG L.J. 403 (2010).

71. *Id.* at 404.

72. Benny, *supra* note 66, at 1504.

73. *Id.* at 1506.

74. See generally Shook, Hardy & Bacon, Food and Beverage Litigation Update, [http://www.shb.com/fblu\\_newsletters.aspx](http://www.shb.com/fblu_newsletters.aspx) (last visited Feb. 25, 2013) (detailing, on a weekly basis, several lawsuits filed over the term “natural” with food products).

75. See A. Bryan Endres & Nicholas R. Johnson, *United States Food Law Update: The FDA Food Safety Modernization Act, Obesity and Deceptive Labeling Enforcement*, 7 J. FOOD L. & POL’Y 135 (2011); Benny, *supra* note 66; Schlosser, *supra* note 67.

76. GENOMICS.ENERGY.GOV, *Genetically Modified Foods and Organisms*, [http://www.ornl.gov/sci/techresources/Human\\_Genome/elsi/gmfood.shtml](http://www.ornl.gov/sci/techresources/Human_Genome/elsi/gmfood.shtml) (last visited Feb. 26, 2013); Benny, *supra* note 66, at 1520.)

GMOs.<sup>77</sup> While generally accepted by US farmers and federal agencies as safe and effective, consumers are somewhat more skeptical.<sup>78</sup> One consumer filed a case against Quaker Oats claiming that its Mother's Natural line of cereals advertised as "all natural" but containing GMOs, violated state unfair competition and false advertising laws.<sup>79</sup> Similarly, consumers filed a class action against General Mills for allegedly misleading claims that Kix cereal, advertised as containing "all natural" corn, also contains genetically modified corn.<sup>80</sup> Several General Mills snack foods were also subject to lawsuits for marketing as "all natural" despite containing GMOs.<sup>81</sup> As of this writing, the courts have not issued any dispositive orders. Although early in the process, it is certain that if the plaintiffs are successful in their claims, the ubiquitous nature of GMOs in the food supply will have a substantial impact on the ability of many large food processors to market their products as "all natural."

### 3. How much processing is "too much" for a "Natural" Food?

The Judicial Panel on Multidistrict Litigation consolidated six lawsuits against Tropicana alleging that the company deceptively marketed its not-from concentrate orange juice as "100% Pure & Natural," even though extensive pasteurizing and processing is used to make the juice.<sup>82</sup> The case will be heard before a multidistrict litigation court. In another juice-related case, a plaintiff alleged that Jamba Juice falsely misrepresented its smoothie kit as "All Natural" because the kit actually contained unnaturally processed and synthetic ingredients, including stevia.<sup>83</sup> The Court granted Jamba Juice's motion to dismiss in-part for plaintiff's failure to state a warranty claim under California's Magnuson-Moss Warranty Act. As of this writing, the plaintiff has not yet filed an amended claim.<sup>84</sup>

---

77. *Id.*

78. *Id.*; Rick Blizzard, *Genetically Altered Foods: Hazard or Harmless*, GALLUP, <http://www.gallup.com/poll/9034/Genetically-Altered-Foods-Hazard-Harmless.aspx> (last visited Mar. 28, 2013).

79. *Mitro v. The Quaker Oats Co.*, No. BC486882 (Cal. Superior Ct., Los Angeles Cnty., filed June 19, 2012).

80. *Pfeifer v. General Mills Inc.*, No. 12-15157 (D.N.J., filed June 13, 2012).

81. *Garcia v. General Mills Inc.*, No. 12-cv-22363 (S.D. Fla., filed June 26, 2012).

82. *In re: Tropicana Orange Juice Mktg. & Sales Practices Litig.*, MDL No. 2353 (J.P.M.L., order entered June 11, 2012).

83. *Anderson v. Jamba Juice Co.*, No. 12-1213 (U.S. Dist. Ct., N.D. Cal., Filed March 12, 2012).

84. *Anderson v. Jamba Juice Co.*, No. 12-1213 (U.S. Dist. Ct., N.D. Cal., order entered August 25, 2012).

In an ice cream case, a federal court in California dismissed federal warranty claims, but allowed state-law claims to proceed based on allegations that the company misled consumers by labeling its products with the phrases “All Natural Flavors” and “All Natural Ice Cream.”<sup>85</sup> The plaintiffs alleged that Dreyer’s and Edy’s labels should not claim “All Natural Flavors” because the products contain between one and five artificial and synthetic ingredients.<sup>86</sup> The court’s rationale in dismissing the federal claim focused on its interpretation of the term natural as descriptive, rather than providing any assurance that the product is defect free under the Federal Magnuson-Moss Warranty Act.<sup>87</sup> The issue boils down to the difference between regulations of ingredients and flavorings; while the phrase natural ingredients has no federal definition, the term natural flavors does.<sup>88</sup> If the “All Natural Flavors” claim had been listed in the ingredient statement, rather than on the general label, the court might have sided with Dreyer’s over whether the state claim was preempted by Federal labeling law.<sup>89</sup> Federal law requires a state law to be identical to the federal labeling requirements, and specifies how flavorings should be labeled, including the use of the term “natural flavor.”<sup>90</sup> However, because the “All Natural Flavors” was listed as a general claim on the front of the packaging, the court decided it was possible for a consumer to see the claim and believe that entire line of ice cream was “All Natural,” instead of just the flavoring ingredients.<sup>91</sup> A similar case was filed in September 2012 against the company that makes “All Natural Ben & Jerry’s Ice Cream.” Plaintiffs

---

85. *Astiana v. Dreyer’s Grand Ice Cream, Inc.*, No C-11-2910 EMC; *Rutledge-Muhs v. Dreyer’s Grand Ice Cream, Inc.*, No. C-11-3164 EMC (U.S. Dist. Ct., N.D. Cal., order entered July 20, 2012).

86. *Id.*

87. *Id.*

88. 21 C.F.R. § 101.22(h)(1) (2012).

89. *Astiana v. Dreyer’s Grand Ice Cream, Inc.*, No C-11-2910 EMC (Oct. 12, 2012).

90. 21 U.S.C. § 343-1(a)(3)(2012); 21 C.F.R. § 101.22(h)(1)(2012).

91. *Astiana v. Dreyer’s Grand Ice Cream, Inc.*, No C-11-2910 EMC (Oct. 12, 2012); *see also* *Lam v. General Mills, Inc.*, No. 11-5056-SC (May, 2012) (showing the same district court denied a motion to dismiss after finding that a reasonable consumer could be deceived by the claim “made with real fruit” coupled with images of natural fruits, despite the ingredient statement listing partially hydrogenated oil and sugars, agreeing with the plaintiff that the label for Fruit Roll Ups and Fruit by the Foot were misleading). *Compare* *Carrea v. Dreyer’s Grand Ice Cream, Inc.*, No. 11-15263 (9th Cir. 2012) (displaying a similar case filed against Dreyer’s Grand Ice Cream, Inc. (Driers), where Driers successfully argued for dismissal that a warranty claim was preempted by the Federal Food, Drug and Cosmetic Act and the Nutrition Labeling and Education Act because the use of the term “0g Trans Fat” has a federal definition that allows up to .5 grams of trans fat per serving to be listed as “0g Trans Fat” on the label).

alleged that the company's use of alkalized cocoa, corn syrup, partially hydrogenated soybean oil, and other ingredients that do not exist in nature precludes use of an "all natural" label.<sup>92</sup>

As previously mentioned, due to its extensive processing, high fructose corn syrup has a long history of litigation surrounding whether or not it qualifies as a natural food ingredient.<sup>93</sup> Most recently, plaintiffs filed a class action suit against General Mills alleging violations of California's unfair competition and false advertising laws arising from General Mill's allegedly deceptive representations that their Nature Valley products, labeled as "all natural," "natural," and "100% natural" despite incorporating highly processed ingredients such as HFCS, high maltose corn syrup, and maltodextrin.<sup>94</sup> The complaint also claimed that General Mills takes advantage of consumers with words and images in its marketing and labeling that depict the outdoors and natural scenes that attract consumers with preferences for natural foods.<sup>95</sup> As of this writing, no further action has occurred.

### *C. Rebranding High Fructose Corn Syrup*

Aside from the typical consumer driven class action suits regarding use of the term natural with high fructose corn syrup (HFCS) discussed in the previous section, the sweet substance was also involved in broader labeling issues over the use of the term "corn sugar." The most common form of HFCS (HFCS-42 and HFCS-55) is similar to regular table sugar, except instead of sucrose, HFCS contains fructose and glucose.<sup>96</sup> Food manufacturers prefer HFCS to table sugar because its chemical properties provide better flavor enhancement and overall stability, consistency and texture of the food.<sup>97</sup> At least one scientific study, however, has linked HFCS to obesity based on ecological studies of consumption rates and obesity rates in geographic locations.<sup>98</sup> Proponents of the product note that the limited research available on the effects of HFCS precludes

---

92. *Tobin v. Conopco, Inc.*, No. 1:33-av-00001 (U.S. Dist. Ct., D.N.J., Newark Div., filed September 13, 2012).

93. *See Endres & Johnson, supra* note 75, at 156; *Benny, supra* note 66, at 1512; *Schlosser, supra* note 67, at 147.

94. *Janney v. General Mills Inc.*, No. C12-3919 (U.S. Dist. Ct., N.D. Cal., filed July 26, 2012).

95. *Id.*

96. Suzen M. Moeller et al., *The Effects of High Fructose Corn Syrup*, 28 J. OF THE AM. C. OF NUTRITION 619 (2009).

97. *Id.*

98. *Id.* at 619-20.

conclusively attaching to it the negative image portrayed in some media outlets.<sup>99</sup>

In an effort to side-step negative images, the Corn Refiners Association (CRA) petitioned FDA to authorize the term “corn sugar” as an alternative name for high-fructose corn syrup. Specifically, the petition had asked the agency to (1) amend the GRAS affirmation regulation for HFCS to designate corn sugar as an optional name; (2) to eliminate corn sugar as an alternate name for dextrose; and (3) to replace all references to corn sugar with dextrose in the GRAS regulations for corn sugar.<sup>100</sup>

The FDA cited several reasons for rejecting the proposed “re-branding” of HFCS including that (1) HFCS cannot be called sugar because sugar is a solid, dried and crystalized food; (2) for 30 years, the term corn sugar has been used as the common or usual name for dextrose; and (3) corn sugar (dextrose) is a safe ingredient for those with hereditary fructose intolerance or malabsorption, and changing the name for HFCS to corn sugar would pose a public health concern for that population.<sup>101</sup>

FDA’s rejection of the corn sugar rebranding effort, however, does not in any way signal the end of the road for legal challenges related to HFCS. In addition to the ongoing “consumer deception” litigation, the NGO Citizens for Health filed a petition<sup>102</sup> with the FDA requesting that the agency amend its HFCS regulation to require food producers to identify its concentration of fructose on the product labels. For example, HFCS with 42 percent fructose would be labeled “high fructose corn syrup 42.” Additionally, the petition urged that if producers manipulate the amount of fructose in HFCS to a different concentration than a standardized blend of 42 or 55, the resulting concentration should be incorporated into the ingredient name. For example, HFCS with 90 percent fructose would be labeled “high fructose corn syrup 90.”<sup>103</sup> Citizens for Health also requested FDA enforcement against food companies using HFCS with fructose in amounts other than 42 or 55 percent blends recognized by the agency as

---

99. *Id.* at 619.

100. *Response to Petition from Corn Refiners Association to Authorize “Corn Sugar” as an Alternate Common or Usual Name for High Fructose Corn Syrup*, FDA, <http://www.fda.gov/AboutFDA/CentersOffices/OfficeofFoods/CFSAN/CFSANFOIAElectronicReadingRoom/ucm305226.htm> (last visited Mar. 27, 2013).

101. *Id.*; Veronica Louie, *Masquerading Behind Words: The Corn Refiners Association’s Push to Rename High-Fructose Corn Syrup as “Corn Sugar,”* 4 NORTHEASTERN U. L. J. 293 (Spring 2012). (providing a more in depth discussion of the Corn Refiner’s Association’s attempt to rename high fructose corn syrup).

102. Citizens for Health Petition, (Aug. 15, 2012), *available at* <http://www.citizens.org/http://www.citizens.org/wp-content/uploads/2012/08/CFH-Citizen-Petition-to-FDA-on-HFCS.pdf>.

103. *Id.*

GRAS. Petitioners claim that scientific studies indicating that higher fructose concentrations can have negative effects on humans, thus disqualifying the product's GRAS status.<sup>104</sup> The FDA responded to the petition in February of 2013, informing Citizens for Health that the agency did not have time to respond to the petition within 180 days of receipt of the petition because of agency priorities, but would review the petition in the future.<sup>105</sup>

#### *D. Mandatory Labeling for Genetically Modified Organisms*

On the front line of the intersection between large-scale food interests (i.e., commodity agriculture, food processors, national grocery chains) and consumer labeling advocates was California's ballot initiative for the labeling of food products produced with genetically modified organisms—Proposition 37. The measure failed, with 48.6% of California voters voting yes for Proposition 37 and 51.4% voting no. Under the proposal, foods offered for retail sale that have been, or that may have been, entirely or partially produced with genetic engineering would have been required to be labeled with a statement disclosing that fact.<sup>106</sup> The initiative defined genetically engineered as the manipulation of an organism's genetic material through methods such as direct injection of nucleic acid into cells or fusion of cells in a way that does not occur through natural multiplication or recombination.<sup>107</sup>

The highly contested electoral battle attracted significant financial backing both for and against Proposition 37. Michele R. Simon, a lawyer and spokesperson for the Yes on 37 campaign speculated that the proposition failed due to "Lies, dirty tricks and \$45 million" spent by industry against the proposition.<sup>108</sup> Others argue that the proposition failed because the scientific consensus so far has indicated that genetically engineered foods are safe for consumers, and labeling would create a

---

104. *Id.*

105. FDA response to Citizens for Health, (Feb. 14, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=FDA-2012-P-0904-0115>.

106. *Official Voter Information Guide*, CALIFORNIA GENERAL ELECTION RESULTS, <http://voterguide.sos.ca.gov/propositions/37/title-summary.htm> (last visited Mar. 27, 2013).

107. Proposed Proposition 37 Regulations (2012), *available at* <http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf#nameddest=prop37>.

108. Karl Haro von Mogel, *Why Did Proposition 37 Fail?*, FOOD SAFETY NEWS, (Nov. 19, 2012), <http://www.foodsafetynews.com/2012/11/why-did-proposition-37-fail/#.UNTqclE2f3A>.

tremendous burden on the food supply system resulting in increased food prices.<sup>109</sup>

Advocates for mandatory labeling of genetically engineered foods quickly shifted their attention to a Washington State initiative. Initiative I-522, titled the People's Right to Know Genetically Engineered Food Act, would require labeling of food products (including dietary supplements) that contain genetically modified organisms (GMO's).<sup>110</sup> The Initiative is similar to California's Proposition 37 in that it seeks to have the legislature require GMO labeling; specifically, labeling of foods, including raw agricultural products, processed foods, seed and seed stock offered for retail sale that have been or may have been, entirely or partially produced with genetic engineering. As of December 21, 2012, activists reported they had gathered enough signatures to send the GMO labeling initiative to the next session of the Washington legislature.<sup>111</sup> Under state rules, the legislature must consider whether or not to adopt the law during the next session. If the legislature declines to act, the measure will go back to the voters to decide.<sup>112</sup> Thus the battle over labeling food produced via use of genetic engineering continues on the West coast after several legal uproars in Ohio<sup>113</sup> and Vermont.<sup>114</sup>

Finally, at the federal level, fifty-five members of Congress sent a March 12, 2012 letter<sup>115</sup> to the FDA in support of a citizen petition demanding the labeling of genetically engineered foods. The petition, filed by the Center for Food Safety on behalf of the Just Label It campaign,

---

109. *Id.*

110. Hank Schultz, *Organizers Confident Washington State Non-GMO Initiative will Hit Signature Goal*, FOOD NAVIGATOR-USA.COM, (Dec. 17, 2012), <http://www.foodnavigator-usa.com/Regulation/Organizers-confident-Washington-state-non-GMO-initiative-will-hit-signature-goal>.

111. Erik Smith, *Supporters Say They Have Signatures to Place Labeling Measure Before Legislature, Voters—Raises Possibility of Another Big-Spending Ballot Fight*, WASHINGTON STATE WIRE, (Dec. 21, 2012), <http://washingtonstatewire.com/blog/fresh-from-california-a-fight-over-genetically-modified-food-comes-to-washington-i-522-will-drive-furious-debate/>.

112. *Id.*

113. *Int'l Dairy Foods Assoc. v. Boggs*, 622 F.3d 628 (6<sup>th</sup> Cir. 2010) (striking down Ohio's regulation that prohibited dairy processors from making claims about the absence of artificial hormones (rBST) in their milk products).

114. *Int'l Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67, 69 (2d Cir. 1996) (striking down Vermont's regulation that required dairy processors to label any product produced with the use of rBST).

115. Congressional letter to Commissioner Hamburg, (Mar. 12, 2012), *available at* <http://www.leahy.senate.gov/imo/media/doc/Final%20Signed%20GE%20Labeling%20Letter.pdf>.

asserts that the lack of any labeling makes GE foods misleading.<sup>116</sup> The letter from members of Congress urged the FDA “to protect a consumer’s right to know, the freedom to choose what we feed our families, and the integrity of our free and open markets.”<sup>117</sup> As of this writing, the FDA has not yet made a determination on the petition.

### III. Animal Production and Labeling Issues

In 2012, a variety of animal and livestock related legal issues generated significant attention. As discussed in more detail below, consumer interest groups appeared to make some progress in their decades-long dispute with the FDA over the subtherapeutic use of antibiotics in animal production, consumer outrage over lean finely textured beef—commonly referred to with the endearing term “pink slime”—delivered a potential death blow to the industry, animal welfare groups reached a détente with some egg producers, the Supreme Court, on preemption grounds, rejected California’s attempt to prohibit downer animals from entering the human food supply chain, and the World Trade Organization rejected the Country of Origin Labeling regime for beef in the US.

---

116. *Press Releases: 55 Members of Congress Join in Support of Center’s Legal Petition*, CENTER FOR FOOD SAFETY, <http://www.centerforfoodsafety.org/2012/03/27/record-breaking-one-million-public-comments-demand-fda-label-genetically-engineered-foods/> (last visited Mar. 27, 2013).

117. *Id.*



*A. Citizen and Advocacy Involvement in Long Running Dispute with FDA over Withdrawal of Subtherapeutic use of Penicillin and Tetracyclines*

The long-running saga regarding penicillin and tetracycline for subtherapeutic use in animal production inched ever closer to resolution in 2012 through the involvement of several citizen groups and advocacy organizations. The story begins in the mid 1950's, when the FDA approved several applications for the use of penicillin and tetracyclines for non-disease treatment purposes such as growth promotion and feed efficiency.<sup>118</sup> The drugs were properly approved as a new animal drug under the Food, Drug, and Cosmetic Act (FDCA), and thus also subject to the FDA's ongoing obligation to review usage and withdraw approval if new evidence shows that the drug is not safe.<sup>119</sup> The FDA later exercised that power by creating a task force to review antibiotic usage in animal feeds, which concluded that the practice was creating a human health hazard.<sup>120</sup> At the same time, the FDA issued a regulation stating that the agency would propose to withdraw all non-therapeutic uses of antibiotics in animal feed unless the agency's concerns that the drug usage had not been proven to be safe were resolved.<sup>121</sup> The FDA invited drug and livestock industry participants to submit data showing that the subtherapeutic use would not lead to decreased effectiveness of these important antibiotics for human usage.<sup>122</sup>

Subsequently, the FDA assigned a subcommittee to review the submissions from over 380 livestock and poultry producers; drug and feed manufacturers; academics; and individuals.<sup>123</sup> In 1973, the FDA went forward by issuing a regulation that the agency would propose to withdraw approval of antibiotics in animal feed unless conclusive evidence that no human health hazard existed from the subtherapeutic antibiotic usage.<sup>124</sup> By 1977, the FDA did issue proposals to amend the regulations to eliminate penicillin<sup>125</sup> and tetracyclines<sup>126</sup> for subtherapeutic use. At the same time,

---

118. *NRDC v. FDA*, 872 F.Supp.2d 318, 322 (S.D.N.Y. June 1, 2012).

119. 21 U.S.C. § 360(b)(e), 21 C.F.R. § 514.80(a)(3).

120. Antibiotic and Sulfonamide Drugs in Animal Feeds, Proposed Statement of Policy, 37 Fed. Reg. 2,444 (Feb. 1, 1972).

121. *Id.*

122. *Id.* at 2,445.

123. Antibiotic and Sulfonamide Drugs in Animal Feeds, Proposed Statement of Policy, 38 Fed. Reg. 9,811 (Apr. 20, 1973).

124. *Id.* at 9813.

125. Penicillin in Animal Feeds; Proposed Rulemaking, 42 Fed. Reg. 43,770 (Aug. 30, 1977).

126. Tetracycline (Chlortetracycline and Oxytetracycline)-Containing Premixes; Opportunity for Hearing, 42 Fed. Reg. 56,264, (Oct. 21, 1977).

the FDA also issued notice of an opportunity for hearing (NOOH) in which drug companies would bear the burden of showing that such risks did not exist.

The FDA later published notice that twenty drug firms, agricultural organizations and individuals had requested a hearing and that the hearing would be scheduled “as soon as practicable.”<sup>127</sup> Fast-forwarding thirty years, the FDA has yet to hold a hearing and withdrawal proceedings have not advanced. The FDA continued to collect data on the issue with three separate studies failing to show that continued subtherapeutic use of the antibiotics was safe for the long term effectiveness of these important drugs.<sup>128</sup>

Industry resistance to halting subtherapeutic use has centered on increased costs due to decreased feed efficiency and the subsequent increased necessity of therapeutic antibiotics to treat disease outbreaks.<sup>129</sup> On the other hand, one scholar has noted that even if production drops as a result of suspending subtherapeutic antibiotic use, higher prices at the retail level for “antibiotic-free” poultry will actually result in greater industry profitability.<sup>130</sup> However, the lack of comprehensive data on the subtherapeutic use of antibiotics in US livestock production makes it difficult to rely on empirical data in setting public policy.<sup>131</sup> Further complicating the policy area, the structure of the FDCA makes for a cumbersome withdrawal process by requiring specific findings and a hearing process<sup>132</sup> that may not allow quick action as scientific knowledge advances.<sup>133</sup>

Growing consumer concern is a significant driver in the call for withdrawal of subtherapeutic antibiotics. Representative Louise Slaughter (D-NY), an outspoken critic of the practice, conducted a study in early 2012 on antibiotic use policies in fast food companies, meat producers and processors, as well as grocery store chains.<sup>134</sup> The survey found that the majority of food producers use antibiotics in a preventative manner and that

---

127. Penicillin and Tetracycline in Animal Feeds, Hearing, 43 Fed. Reg. 53,827 (Nov. 17, 1978).

128. NRDC v. FDA, No. 11 Civ. 3562 WL 983544 (S.D.N.Y. Mar. 22, 2012).

129. Terence J. Centner, *Regulating the Use of Non-Therapeutic Antibiotics in Food Animals*, 21 GEO. INT’L ENVTL L.J. 1 (Fall 2008).

130. *Id.* at 19.

131. *Id.* at 20.

132. 21 C.F.R. § 514.115 (2007).

133. Centner, *supra* note 129, at 34.

134. Congresswoman Louise M. Slaughter, “What’s in the Beef?” Survey Results, (July 2, 2012), available at [http://www.louise.house.gov/index.php?option=com\\_content&view=article&id=2744:survey-results-antibiotics-in-the-food-you-buy&catid=69&Itemid=59](http://www.louise.house.gov/index.php?option=com_content&view=article&id=2744:survey-results-antibiotics-in-the-food-you-buy&catid=69&Itemid=59).

the laws, as currently written, fail to prevent the emergence of antibiotic resistant microbes.<sup>135</sup> Accordingly, Rep. Slaughter called for the FDA to combat the growing problem of antibiotic resistance resulting from the use of low levels of pharmaceuticals on otherwise healthy food-producing animals<sup>136</sup> and introduced a bill to phase out subtherapeutic use of antibiotics, while preserving authority to use antibiotics to treat sick animals.<sup>137</sup> Similarly to the FDA's thirty-year failure to hold a hearing described above, the legislative session ended without action on the bill.

The Congressional and agency atrophy in this issue, however, appears to be dislodged by the creative use of the judicial system. In May of 2011, the Natural Resources Defense Council, along with other plaintiffs, filed suit against the FDA alleging that the agency unlawfully withheld or delayed action on this issue and that the agency arbitrarily denied citizen petitions to take action on the withdrawal proceedings.<sup>138</sup> In December of 2011, the FDA rescinded its thirty-year old notice of opportunity for a hearing, citing the need to update the data and the agency's wish to engage in other regulatory strategies—setting the stage for a later legal challenge.<sup>139</sup> Accompanying the rescission, FDA unveiled a new, voluntary subtherapeutic withdrawal program, which it claimed was more effective and a better use of agency resources in meeting the goal of controlling antibiotic resistance in humans.<sup>140</sup> As a part of the voluntary program, FDA released three documents: (1) an industry guidance document titled, "The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals," (2) a draft industry guidance document for removing production use of antibiotics from labels, and (3) a draft directive for the veterinary industry to oversee the use of antibiotics in animal feed.<sup>141</sup> Collectively, the guidance documents emphasize the use of antibiotics only

---

135. *Id.*

136. Helena Bottemiller, *Rep. Slaughter Calls for Greater FDA Focus on Preserving Antibiotics*, FOOD SAFETY NEWS, Sept. 26, 2012, available at <http://www.foodsafetynews.com/2012/09/rep-slaughter-calls-for-greater-fda-focus-on-preserving-antibiotics/>.

137. Preservation of Antibiotics for Medical Treatment Act of 2011, H.R. 965, 112<sup>th</sup> Cong. (2012), available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.965.IH>.

138. Withdrawal of Notice of Opportunity for a Hearing; Penicillin and Tetracycline Used in Animal Feed, 76 Fed. Reg. 79,697 (Dec. 22, 2011).

139. NRDC v. FDA, No. 11 Civ. 3562 WL 983544, 7 (S.D.N.Y. Mar. 22, 2012).

140. NRDC v. FDA, No. 11 Civ. 3562 WL 3229296, 13 (S.D.N.Y. Aug. 8, 2012).

141. Press Release, Food and Drug Administration, FDA takes steps to protect public health (Apr. 11, 2012) available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm299802.htm>

for medically-necessary treatment under the supervision of a veterinarian.<sup>142</sup>

Despite the hearing rescission and introduction of a voluntary withdrawal program, the NRDC case filed in May 2011 progressed. In a March 2012 opinion, a federal magistrate judge held that a discrete action by the FDA had occurred when the FDA found that subtherapeutic uses should be withdrawn.<sup>143</sup> The holding rejected the defendant's argument that the discrete action subject to judicial review occurred in the 1970s when the agency first issued its notice of opportunity for hearings. The identification of the discrete action is important to the plaintiffs' cause of action because where the Administrative Procedure Act permits a court to "compel action unlawfully or unreasonably delayed,"<sup>144</sup> the Supreme Court has found that the provision only applies if an agency "failed to take a discrete action it was required to take."<sup>145</sup> This is also important because had the judge otherwise found that the discrete action occurred when the NOOHs were issued, the FDA may have found traction on its argument that the rescission of the NOOHs in December of 2011 mooted the plaintiffs' claim.<sup>146</sup>

The court further held that the FDCA unambiguously required the agency to conduct withdrawal proceedings, even before the FDA Administrator has made a finding after a formal hearing—an action the agency had failed to undertake.<sup>147</sup> After receiving additional briefs on the matter of a timeline for withdrawal proceedings, the judge adopted the FDA's proposed hearing schedule that calls for proceedings to be completed over a 41-month timeframe.<sup>148</sup> The judge also denied the government's request for a stay pending an appeal of the March order, finding that although the government has a substantial case on appeal, the likelihood of injury to the government if a stay were not granted was low.<sup>149</sup>

A third decision on this case added more development. Regarding the citizen petitions, the judge held in a June 2012 decision that the withdrawal of the request for hearings was more analogous to informal rulemaking than an enforcement action. As such, the withdrawal was not an issue of

---

142. *Id.*

143. NRDC, WL 983544 at 10.

144. 5 U.S.C. § 706(1) (2012).

145. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004).

146. NRDC, WL 983544 at 7.

147. *Id.* at 10.

148. NRDC, WL 3229296 at 9.

149. *Id.* at 14-15.

agency discretion, but rather subject to court review.<sup>150</sup> The court further held that the FDA's denial of the citizen petitions and subsequent promulgation of the agency's new voluntary program was arbitrary, capricious, and in violation of the FDCA.<sup>151</sup>

*B. Consumer Outcry Against LFTB Results in Purchasing Changes and Labeling Initiatives*

In general, consumer awareness of, and influence over the agriculture industry continues to grow beyond the more traditional issues with a direct impact on human health. Consumers are demanding greater knowledge of the foods they consume—from farm to fork. The same is true of the beef industry.

Lean Finely Textured Beef (LFTB), better known after a year of infamy as “pink slime,” is a key example. LFTB is a beef product developed by Beef Products, Inc. (BPI) in 1991 as a way to provide more domestic lean beef to the U.S. market.<sup>152</sup> The process involves heating scrap beef trimmings and sending the product through a centrifuge that separates the fat and meat. The resulting LFTB product is around 94% lean and used as a supplement in traditional ground beef to boost the final leanness of the meat products.<sup>153</sup> LFTB is also used in lunch meats, sausages, and canned meats.<sup>154</sup> To prevent contamination by E. coli, Salmonella, and other common pathogens found in beef, BPI's process also treats the LFTB with food grade ammonium gas.<sup>155</sup> The FDA currently lists the use of ammonium gas as “generally recognized as safe,” if used according to good manufacturing practices.<sup>156</sup>

On March 7, 2012, ABC News broadcasted a report about the use of LFTB in retail beef products.<sup>157</sup> The report featured a former USDA scientist as a “whistleblower,” who informed the news network that 70% of ground beef in the U.S. contains what the industry refers to as “pink slime” and that there were no requirements to label beef that contained LFTB. Not surprisingly, the news report generated widespread backlash against the use

---

150. NRDC v. FDA, 872 F.Supp.2d 318 (S.D.N.Y. June 1, 2012).

151. *Id.* at 339.

152. JOEL L. GREENE, LEAN FINELY TEXTURED BEEF: THE “PINK SLIME” CONTROVERSY, CONGRESSIONAL RESEARCH SERVICE, (Apr. 6, 2012), *available at* <http://www.fas.org/sgp/crs/misc/R42473.pdf>.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Pink Slime and You*, ABC WORLD NEWS, <http://abcnews.go.com/WNT/video/pink-slime-15873068> (last visited Mar. 12, 2013).

of LFTB. McDonalds, Burger King, Costco, Publix, and Whole Foods, along with several other retail grocery chains, pledged to exclude LFTB from their product offerings.<sup>158</sup> A survey of consumer opinions revealed that 88 percent of adults were aware of pink slime, with 76 percent ranking themselves “at least somewhat concerned” and 30 percent “extremely concerned.”<sup>159</sup>

## 1. Food Libel

The steep decline in demand for LFTB took a toll on BPI, which closed three of its four processing plants following the public disclosure. BPI has since filed a \$1.2 billion dollar defamation suit against ABC News, Diane Sawyer, several ABC News employees and two former USDA employees.<sup>160</sup> The suit, filed on September 13, 2012, claims that the defendants knowingly and intentionally published 200 false statements regarding both BPI and its LFTB product.

The ultimate success of the lawsuit is not assured. BPI filed the suit in South Dakota, likely to take advantage of the state’s food libel laws.<sup>161</sup> Food libel laws establish an action in tort for damages resulting from falsely criticizing the safety of a perishable agricultural product.<sup>162</sup> South Dakota law provides recourse for producers of perishable food products for statements which are known to be false and that imply a product is not safe for public consumption.<sup>163</sup>

Although of questionable constitutionality,<sup>164</sup> application of food libel laws in the context of meat products may be exceptionally difficult to successfully pursue.<sup>165</sup> For example, the Texas Beef Group brought an unsuccessful suit under Texas’ version of a food libel law (Tex. Civ. Prac. & Rem. § 96.001-004) against The Oprah Winfrey Show and one of its guests after claims were made on the show that American beef was unsafe

---

158. *BPI and Pink Slime: An Updated Timeline*, FOOD SAFETY NEWS, Sept. 26, 2012, available at <http://www.foodsafetynews.com/2012/09/bpi-and-pink-slime-an-updated-timeline/#.USKVR1pesco>.

159. *Id.*

160. *Beef Prods. Inc. v. ABC Inc.*, No. n/a (Cir. Ct., Union Cnty., S. Dak., filed September 13, 2012).

161. S.D. Codified Laws § 20-10A-1 to 4 (2011).

162. David J. Bederman, *Limitations on Commercial Speech: The Evolution of Agricultural Disparagement Statutes*, 10 DEPAUL BUS. L.J. 169, 170-73 (Spring-Summer 1998).

163. S.D. CODIFIED LAWS § 20-10A-1 to 4 (2011).

164. *See* Bederman, *supra* note 162.

165. Sara Lunsford Kohen, *What Happened to Veggie Libel?: Why Plaintiffs Are Not Using Agricultural Product Disparagement Statutes*, 16 DRAKE J. AGRIC. L. 261, 284 (Summer 2011).

in the immediate panic over so-called mad cow disease.<sup>166</sup> The District Court found that ground beef was not part of the food libel law because it did not decay (i.e., it could be frozen) within a limited period of time, unlike fresh fruit and vegetables. The appellate court, however, did not discuss this issue on appeal.<sup>167</sup> Instead, the court affirmed the decision in favor of Oprah Winfrey based on the fact that the statements were not knowingly false at the time Oprah and her guests taped the show.<sup>168</sup> The South Dakota courts have not spoken on the issue of beef perishability. Further, the statute does not lay out a standard for falsity,<sup>169</sup> adding more doubt to the ultimate success of BPI's case.

BPI's suit may be important if the case speaks to the constitutionality of food libel laws under the First Amendment.<sup>170</sup> On October 30, 2012, ABC filed a motion to dismiss the suit claiming that the stories on LFTB are protected speech under the First Amendment.<sup>171</sup> Under current First Amendment jurisprudence, viewpoint neutrality is a key criterion.<sup>172</sup> If regulation of speech is viewpoint neutral, it is subject to less exacting scrutiny under a constitutional analysis.<sup>173</sup> If the regulation is not viewpoint neutral, it may be unconstitutional *per se*.<sup>174</sup> Regulation is viewpoint neutral if it discriminates on the basis of subject matter, rather than on the motivating ideology, opinion, or perspective behind the speech.<sup>175</sup> Food libel laws such as South Dakota's statute, are likely not viewpoint neutral. The South Dakota statute prohibits, for example, speech that states or implies that a specific food product is not safe for human consumption when it is safe.<sup>176</sup> Such a prohibition is specific to a certain viewpoint-whether a specific product is or is not safe- rather than prohibiting speech on the entire subject of food safety or food manufacturing practices as a whole.

Further complicating matters, if the statute regulates political speech, it is subject to an even higher standard of review.<sup>177</sup> In some respects, a

---

166. *Texas Beef Group v. Winfrey*, 201 F.3d 680 (5th Cir. Feb. 9, 2000).

167. *Id.*

168. *Id.*

169. S.D. CODIFIED LAWS § 20-10A-1(2011).

170. *Id.*

171. *Beef Prods. Inc. v. Am. Broadcasting Cos., Inc.*, No. 2012cv04183 (U.S. Dist. Ct., D.S.D., filed October 24, 2012).

172. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 821 (1995).

173. *Id.* at 820.

174. *Id.* at 829.

175. *Id.*

176. S.D. CODIFIED LAWS § 20-10A-1 to 4.

177. *Citizens United v. Federal Election Commission*, 130 S. Ct. 879, 882 (2010).

determination necessary to assess the falsity of the speech—in this case whether LFTB is safe—may be seen as a political determination because the usage of food grade ammonia gas is regulated by government agencies.<sup>178</sup> If a court were to find that the regulation regards political speech, the South Dakota statute is very likely unconstitutional because “political speech must prevail against laws that would suppress it by design or inadvertence.”<sup>179</sup>

Even if the food label laws survive a viewpoint-based challenge, the restriction on speech must pass strict scrutiny review—a doubtful proposition in the BPI-ABC litigation.<sup>180</sup> Under strict scrutiny, the restrictions must advance a compelling government interest and be narrowly tailored to that interest.<sup>181</sup> Although a case may be made that the government has a compelling interest in managing the public’s perception of the safety of the nation’s food supply, the South Dakota statute is likely not narrowly tailored. For example, the statute does not regulate speech regarding non-perishable food items and thus may be under-inclusive.

In addition to consumer outcry leading to market collapse for LFTB products, legislative and agency solutions to the controversy are moving forward. On March 30, 2012, Representative Chellie Pingree (D-Maine), in response to the LFTB controversy, introduced a bill entitled the Requiring Easy and Accurate Labeling Act (REAL Act).<sup>182</sup> The purpose of the act is to amend the Federal Meat Inspection Act<sup>183</sup> to require producers to label packages of meat that contain LFTB. The House Subcommittee on Livestock, Dairy, and Poultry considered the bill, but as of this writing had not issued a report or held a vote.<sup>184</sup> The USDA, however, has authorized voluntary labeling of LFTB—a step that some believe if taken from the beginning, would have prevented the widespread negative response from consumers.<sup>185</sup>

---

178. GREENE, *supra* note 152, at 5.

179. *Citizens United*, 130 S. Ct. at 882.

180. Sara Lunsford Kohen, *What Happened to Veggie Libel?: Why Plaintiffs Are Not Using Agricultural Product Disparagement Statutes*, 16 DRAKE J. AGRIC. L. 261, 272 (Summer 2011).

181. *Rosenberger*, 515 U.S. at 829.

182. REAL Beef Act, H.R. 4346, 112<sup>th</sup> Cong., Reg. Sess. (2012).

183. 21 U.S.C. § 601 et seq.

184. For up to date information on the status of the REAL Beef Act, see <http://www.govtrack.us/congress/bills/112/hr4346>.

185. See Jim Avila, *BPI Endorses USDA Voluntary Labeling of LFTB or ‘Pink Slime’*, ABC NEWS (Apr. 3, 2012), <http://abcnews.go.com/blogs/headlines/2012/04/bpi-endorses-usda-voluntary-labeling-of-lftb-or-pink-slime/>.



## 2. Undercover Recording and Ag Gag Legislation

In another First Amendment-related food law development in 2012, several states considered legislation penalizing the filming or recording of animal production facilities. These so-called “Ag Gag” bills, generated significant attention after three prominent news programs broadcast undercover footage of workers mishandling and inflicting pain on live chickens, as well as failing to dispose of dead birds.<sup>186</sup> The broadcast resulted in a nationwide uproar that led to McDonald’s, Target, Sam’s Club, and Supervalu to drop all purchasing arrangements with Sparboe, the corporate owner of the facility where the footage took place.<sup>187</sup> The footage in question was made by an undercover investigator working on contract with an animal rights group.<sup>188</sup>

In 2012, Iowa passed what may be the stiffest Ag Gag legislation in the US.<sup>189</sup> Individuals and organizations conducting any filming or recording without the permission of the animal facility are subject to a detailed list of possible violations.<sup>190</sup> Not limited to animal operations, the Iowa law applies to undercover recordings of cropping operations.<sup>191</sup> Of course, one could insert a joke here about how the punishment of “watching grass grow” should be a sufficient deterrent measure from recording cropping operations. Nonetheless, under the Iowa law,

---

186. Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms* 42 ENVTL. L. REP. NEWS & ANALYSIS 10960, (2012).

187. *Id.*

188. Mercy For Animals, *Undercover Investigations: Exposing Animal Abuse*, <http://www.mercyforanimals.org/investigations.aspx> (last visited Mar. 27, 2013). In another filming incident, an animal rights group coordinated footage of inhuman treatment of cattle at a Hanford, California slaughterhouse. The video motivated the USDA’s Food Safety and Inspection Service to investigate whether downer cows entered the food supply in violation of food safety standards. Although the agency did suspend operations by removing their mark of inspection while investigating the incident, FSIS concluded that no food safety violation occurred and no recall was issued. Press Release, USDA, *USDA Suspends Central Valley Meat for Humane Handling Violations* (Aug. 21, 2012), available at [http://www.fsis.usda.gov/news/NR\\_082112\\_01/index.asp](http://www.fsis.usda.gov/news/NR_082112_01/index.asp).

189. IOWA CODE ANN. § 717A (West 2013).

190. IOWA CODE ANN. § 717A.2(1) (prohibiting persons from willfully injuring an animal, exercising control over an animal facility with intent to remove an animal, or entering onto an animal facility if the facility is not open to the public with the intent to disrupt operations, among others); IOWA CODE ANN. § 717A.3 (prohibiting destroying crops and remaining on crop operations after being asked to leave, among others).

191. IOWA CODE ANN. § 717A.3.

organizations coordinating the undercover investigators in past sting operations may be prosecuted along with the actual individual conducting the recording.<sup>192</sup> Repeat convictions are a Class D Felony and may result in a prison sentence of five years.<sup>193</sup> Utah also passed an Ag Gag bill in late March, 2012.<sup>194</sup> Individuals who obtain employment under false pretenses to gain access to a farm facility may be charged with a serious misdemeanor under Utah law.<sup>195</sup> The Utah bill makes the intentional recording of an agricultural operation a Class A Misdemeanor with the possibility of up to one year in prison for each offense.<sup>196</sup> Kansas,<sup>197</sup> Montana,<sup>198</sup> and North Dakota<sup>199</sup> passed Ag Gag bills in the 1990s declaring it a misdemeanor to interfere with an animal facility by taking pictures or video.

Legislatures in Illinois,<sup>200</sup> Florida,<sup>201</sup> Indiana,<sup>202</sup> and Minnesota<sup>203</sup> also considered but did not pass Ag Gag measures in 2012. For example, the Illinois bill would have defined the offense of animal facility interfering as “creating or possessing, without the consent of the owner, a visual or sound recording made at the animal facility, which reproduces a visual or audio experience occurring at the facility.”<sup>204</sup> Also included within the definition of animal facility interference is “exercising control over the animal facility with the intent to deprive the facility of an animal or property, and entering a facility not open to the public.”<sup>205</sup> This offense would have been a Class A misdemeanor on the first offense and a Class 4 felony for any subsequent

---

192. *Id.* § 717A.3A(3)(a).

193. *Id.* § 717A.2(3)(b).

194. UTAH CODE ANN. § 76-6-112 (West 2013).

195. *Id.* § 76-6-112(2)(a)-(d).

196. *Id.*

197. KAN. STAT. ANN. § 47-1827 (West 2013).

198. MONT. CODE ANN. § 81-30-103 (West 2013).

199. N.D. CENT. CODE § 12.1-21.1-02 (West 2013)

200. Animal Facility Offenses, Ill. H. B. 5143, 97<sup>th</sup> General Assembly (2012), available at <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=84&GA=97&DocTypeId=HB&DocNum=5143&GAID=11&LegID=65244&SpecSess=&Session=>.

201. Fla. S.B. 1246, Reg. Sess. (2011), available at <http://www.flsenate.gov/Session/Bill/2011/1246/>.

202. Ind. S.B. 0184, 117<sup>th</sup> Gen. Assembly (2012), available at <http://www.in.gov/legislative/bills/2012/PDF/IN/IN0184.1.pdf>.

203. Agricultural offenses penalties and remedies imposition, Minn. S.F. 1118, 87<sup>th</sup> Legislature (2012), available at <https://www.revisor.mn.gov/bills/bill.php?b=Senate&f=SF1118&ssn=0&y=2011>

204. Animal Facility Offenses, H. B. 5143, Sec. 4.3, 97<sup>th</sup> Gen. Assembly (2012).

205. *Id.*

offense.<sup>206</sup> It also would have modified the offense of animal facility fraud to include, “making a false statement or representation on a facility employment application, with the intent to commit an act not authorized by the facility,” with felony classification.<sup>207</sup> The bill authorized civil damages in the amount of treble actual damages for such offenses, plus attorney fees.<sup>208</sup>

In advance of the failure of these four bills, the American Society for the Prevention of Cruelty to Animals released the results of a survey conducted by Lake Research Partners with the following results.<sup>209</sup> The report found that, “seventy-one percent of Americans support undercover investigative efforts by animal welfare organizations to expose animal abuse on industrial farms, including 54 percent who strongly support the efforts.” Accordingly, almost two-thirds (64 percent) of Americans oppose making undercover investigations of animal abuse on industrial farms illegal, with half of all Americans strongly opposing legislative efforts to criminalize industrial farm investigations.<sup>210</sup> From a constitutional perspective, Ag Gag laws, particularly the farthest-reaching laws of Iowa and Utah, may face difficulty in passing scrutiny under the First Amendment. At least one commentator argues that the newsgathering framework established by *Cohen v. Cowles Media Co.* is likely to apply in the Ag Gag context, rendering such statutes unconstitutional.<sup>211</sup> Despite these potential constitutional infirmities, such legislation seems to be a popular trend in states with significant agricultural sectors.

*C. Egg Industry and Citizen Group Agreement Reaches Congress;  
FDA Implements Salmonella Testing Rule*

After years of acrimonious debate surrounding animal welfare ballot initiatives, the Human Society of the United States (HSUS) and the United Egg Producers (UEP) shocked many industry observers and consumers by unveiling compromise legislation designed to regulate shell egg

---

206. *Id.* at Sec. 5.

207. *Id.*

208. *Id.*

209. Press Release, ASPCA, ASPCA Research Shows Americans Overwhelmingly Support Investigations to Expose Animal Abuse on Industrial Farms (Feb. 17, 2012), available at <http://www.aspc.org/Pressroom/press-releases/021712>.

210. *Id.*

211. Bollard, *supra* note 186, at 10962; see also Kevin C. Adam, *Shooting The Messenger: A Common-Sense Analysis Of State “Ag-Gag” Legislation Under The First Amendment* 45 SUFFOLK U. L. REV. 1129, 1137 (2012).

production.<sup>212</sup> The bill, sponsored by Representative Schrader (D-OR) and introduced to the House in January of 2012, sought to establish uniform standards for cage size, create labeling requirements and establish air quality, molting, and euthanasia standards for laying hens.<sup>213</sup> The standards would be phased in over a 15 to 18 year period.<sup>214</sup> Although a companion bill was introduced in the Senate as S.3239 and received a hearing; neither legislative body voted on the respective bills. A reintroduction of bill in 2013 is expected in tandem with the farm bill renewal, although no action has occurred as of this writing in late February.<sup>215</sup>

Industry groups, consumer advocacy organizations, and veterinary associations alike include the bill in their priority items for the 2013 legislative session.<sup>216</sup> The longevity, however, of this unique compromise between animal rights advocates and industry interests remains an open question for the 2013 legislative season. For its part in the compromise, HSUS withdrew its state-level ballot initiatives in Oregon and Washington, and altered its stance in support of only cage-free production.<sup>217</sup> The decision by the board of UEP was apparently controversial,<sup>218</sup> and reflects a motivation to regain public trust and join with the growing tide of public sentiment against conventional cage production.<sup>219</sup> After extensive

---

212. Egg Products Inspection Act Amendments of 2012, H.R. 3798, 112<sup>th</sup> Cong. (2012), available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.3798>.

213. *Id.* at § 7A.

214. *Id.* at § 7B.

215. Joel L. Greene & Tadlock Cowan, *Table Egg Production and Hen Welfare: Agreement and Legislative Proposals*, Congressional Research Service, January 11, 2013.

216. See American Veterinary Medicine Association, Issue Summaries for the 113<sup>th</sup> Congress, available at <https://www.avma.org/Advocacy/National/Congress/Pages/AnimalWelfare-HumanAnimalBondIssues.aspx>; National Cattlemen's Beef Association, Legislative Watch, available at <http://www.beefusa.org/legislativewatch.aspx>; Humane Farming Association, Stop the Rotten Egg Bill, available at [stoptherotteneggbill.org](http://stoptherotteneggbill.org).

217. Greene & Cowan, *supra* note 215.

218. *Id.* at 8, 11.

219. The European Union has been actively regulating egg production for some time now. Beginning January 1, 1988, European Union members adopted minimum size standards, cage construction materials and watering facilities for caged laying hens. Battery cages were subsequently prohibited effective January 1, 2012 and the European Commission has taken action to enforce the prohibition. *Council for the European Communities, Laying down minimum standards for the protection of laying hens kept in battery cages, Council Directive*, March 25, 1986, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1986:095:0045:0048:EN:PDF>; *Animal Welfare: Commission urges 13 Member States to implement ban on laying hen cages*, European Commission, January 26, 2012, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/47>.

deliberation, the American Veterinary Medicine Association supported the compromise legislation.<sup>220</sup> By contrast, agriculture and livestock associations have argued that the bill sets a dangerous precedent of federal animal welfare regulation and limits local control.<sup>221</sup> If this compromise legislation is successful, it may pave the way for other industry groups with an eye towards consumer trends to work collaboratively with various consumer groups on a wide variety of food and animal welfare issues, including the subtherapeutic use of antibiotics, discussed above.

In a related development with respect to shell egg production, the FDA announced publication of "Guidance for Industry: Testing for Salmonella Species in Human Foods and Direct-Human-Contact Animal Foods" in the spring of 2012.<sup>222</sup> The guidance document is intended to guide firms that manufacture, pack, or hold human foods or direct-human-contact animal foods in testing procedures for Salmonella species contamination.<sup>223</sup> It also guides industry in interpreting test results for injuriousness to human health. FDA issued a second final guidance regarding Salmonella and eggs on August 20, 2012 titled "Guidance for Industry: Questions and Answers Regarding the Final Rule, Prevention of *Salmonella Enteritidis* in Shell Eggs During Production, Storage, and Transportation."<sup>224</sup> This document guides industry in determining whether and when producers must comply with prevention measures, sampling and testing requirements, and facility registration procedures under the egg safety rule.<sup>225</sup>

#### *D. Supreme Court Invalidates California's "Downer" Animal Slaughter Law*

On January 23, 2012, the U.S. Supreme Court overturned California's rule that prohibited the slaughtering or selling of non-ambulatory ("downer") animals for human consumption, holding that the Federal Meat

---

220. Greene & Cowan, *supra* note 215, at 10.

221. *See id.* at 13.

222. Guidance for Industry: Testing for Salmonella Species in Human Foods and Direct-Human-Contact Animal Foods, 77 Fed. Reg. 14,022 (Mar. 8, 2012).

223. FDA, *Guidance for Industry: Testing for Salmonella Species in Human Foods and Direct-Human-Contact Animal Foods* (2012), available at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodSafety/ucm295271.htm>.

224. FDA, *Guidance for Industry: Questions and Answers Regarding the Final Rule, Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation* (2012), available at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ucm313728.htm>.

225. *Id.*

Inspection Act (FMIA)<sup>226</sup> foreclosed additional rules implemented at the state level. The case, *National Meat Association v. Harris*, pitted a trade association versus California's Attorney General—the state official charged with enforcing the statute.<sup>227</sup> Although confined to the scope of FMIA in relation to the California rule, the Court's holding could extend to other state efforts to regulate food safety and animal welfare at the point of slaughter.

The Department of Agriculture's Food Safety and Inspection Service (FSIS) administers the FMIA and has promulgated multiple regulations over the years regarding the inspection of animals and meat, as well as other aspects of slaughterhouse operations.<sup>228</sup> Under the FMIA regulations, animals that arrive at a federally inspected slaughterhouse are approved for slaughter or designated as condemned or suspect. Condemned animals must be killed and kept out of the human food supply, but suspect animals, including non-ambulatory animals, are monitored and, at the discretion of the federal inspector, eventually may be approved for human consumption.<sup>229</sup> California's law, codified at section 599f of the Penal Code,<sup>230</sup> however, prohibited the slaughtering or sale of a non-ambulatory animal for human consumption and required that slaughterhouses euthanize all non-ambulatory animals.

The National Meat Association challenged the California rule, asserting that the FMIA expressly preempted the state's regulation of animals presented for slaughter at a federally inspected slaughterhouse. The FMIA's preemption clause prohibits states from imposing any additional or different requirement concerning slaughterhouse facilities and operations that falls within the scope of the FMIA.<sup>231</sup> The FMIA also states, however, that it does not "preclude any State . . . from making [a] requirement or taking other action, consistent with [the FMIA], with respect to any other matters regulated under this Act."<sup>232</sup>

The Supreme Court unanimously reversed the Ninth Circuit's judgment that had upheld the California law. According to the Court, California imposed additional or different requirements on slaughterhouses. Under federal law, a slaughterhouse may find a non-ambulatory animal fit for human consumption, but under California's law, a slaughterhouse must euthanize all non-ambulatory animals and exclude them from the human

---

226. 21 U.S.C. § 601 et seq. (2012).

227. *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 968 (2012.)

228. 9 C.F.R. § 300.1 et seq. (2012).

229. 9 C.F.R. § 313.2(d)-(e) (2012).

230. CAL. PENAL CODE § 599f (West 2013).

231. 21 U.S.C. § 678 (2012).

232. *Id.*

food supply—thereby foreclosing the discretion of the FSIS inspector to deem a non-ambulatory animal fit for slaughter and human consumption. This discrepancy was the fatal flaw in the California “downer animal” rule.

Moving forward, and with respect to other state efforts at animal welfare regulation, the Supreme Court’s decision has several ramifications. First it does not completely restrict the ability of states to regulate the type of animals that can be slaughtered for human consumption in federally inspected slaughterhouses. For example, the Court explained the critical distinction between state laws prohibiting the slaughter of horses (such as the Illinois Meat Act<sup>233</sup>) and California’s prohibition on the slaughter of non-ambulatory animals. A ban on horse slaughter does not affect the daily activities of slaughterhouses because the law prevents horses from being transported to the slaughterhouse itself. California’s ban on the slaughter of non-ambulatory animals functions differently. Because animals become non-ambulatory in transit to, or after arrival at, a slaughterhouse, the ban affects the daily internal activities of slaughterhouses and thus the FMIA. California (or other states seeking to regulate downer animal slaughter) could conceivably check for and remove non-ambulatory animals at an inspection station prior to arrival at a slaughterhouse. In the alternative, a state might also regulate the types of animals that could be ordered for purchase and thus control the type of animal being transported or arriving for slaughter.<sup>234</sup> In sum, the Court’s rejection of California’s approach to resolving the ethical and food safety concerns embedded in the consumption of downer animals has thrown the issue back to the states for further creative solutions.

#### *E. WTO Dealings Affect Labeling and Production Issues*

United States labeling standards evolved on an international level as well in 2012. The World Trade Organization (WTO) issued its final ruling in the long-running Country of Origin Labeling (COOL) beef and pork products dispute between the U.S., Canada, and Mexico. Incorporated as part of the 2008 Farm Bill, the COOL rules required country of origin labeling for livestock as well as other products not subject to the WTO dispute.<sup>235</sup> Canada and Mexico challenged the measure in 2008, citing it as discriminatory. After the original 2011 ruling in favor of Canada and

---

233. 225 ILL. COMP. STAT. § 635/1 (West 2013).

234. See Shelly Barron, *California’s Continued Struggle Against Nonambulatory Animal Slaughter and the Limits of Federal Preemption: National Meat Association v. Brown*, 4 NE U. L. J. 259, 291 (2012).

235. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171 § 10816, 116 Stat. 134, 533-35; C.F.R. Part 60 and Part 65.

Mexico,<sup>236</sup> the US Trade Representative appealed, claiming that the U.S.'s COOL measures do not impose unfavorable treatment of imported products because it requires all meat, regardless of origin, to be labeled under the same set of circumstances.<sup>237</sup>

The WTO Appellate Body upheld parts of its initial ruling from 2011—confirming the right to require labeling—but agreed that U.S. COOL provided less favorable treatment to imported Canadian and Mexican cattle and hogs.<sup>238</sup> Citing extensive paperwork and recordkeeping requirements that were outsized in relationship to the amount of information conveyed to the consumer, the Appellate Body found that the labeling requirements were discriminatory in effect. However, the Appellate Body did not reject the objectives of COOL. Instead, it found that providing consumers with origin information was reasonable, and did not violate Article 2.2 of the Technical Barriers to Trade (TBT) Agreement. However, it made no conclusion as to whether COOL is more restrictive than necessary regarding its objectives.<sup>239</sup>

In an even older WTO dispute relating to beef products, the U.S. and Canada reached an agreement with the European Union (EU) on the treatment of imported beef. The U.S. and Canada have been in a disagreement with the EU over the importation of beef produced with added growth hormones as far back as 1988 and, despite a 1997 WTO ruling that the ban violated world trade rules, it remains in effect. In response to the EU ban, the U.S. and Canada imposed costly trade sanctions, such as \$125 million a year on unique cheeses (Roquefort and Stilton), truffles, chocolates, and other luxury food products imported from the EU. In 2009, the U.S. agreed to gradually lift its sanctions in exchange for an increase in the EU's duty-free import quotas of hormone free beef from North America. In March of 2012, the European Parliament approved

---

236. United States- Certain Country of Origin Labeling (COOL) Requirements- Final Reports of the Panel, Doc # 11-5865. WT/DS384/R, Nov. 11, 2011, *available at* [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(@Symbol=%20wt/ds384/r\\*%20not%20rw\\*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds384/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICanged=true#).

237. United States- Certain Country of Origin Labeling Requirements (2011), *available at* [http://www.ustr.gov/sites/default/files/US.AppellantSub.fin\\_.pdf](http://www.ustr.gov/sites/default/files/US.AppellantSub.fin_.pdf).

238. United States- Certain Country of Origin Labeling (COOL) Requirements- Arb-2012-1/26 Arbitration under Article 21.3(c), Doc # 12-6679, WT/DS384/24 (2012), *available at* [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(@Symbol=%20wt/ds384/24\\*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds384/24*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICanged=true#).

239. World Trade Organization Decision, *available at* [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds384\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm).



a deal between the EU, Canada, and the U.S. that lifts all import duties on targeted European luxury foods in exchange for the increase of the annual quota on imports of hormone free beef to 48,000 metric tons while maintaining its ban on imports of hormone treated beef.<sup>240</sup> Although temporarily relieving the pressure on beef imports and resulting tariffs, the recent announcement of talks regarding an EU-US free trade agreement may reopen this sensitive area.<sup>241</sup>

#### IV. Concluding Thoughts

From various food bans to criminalizing undercover recording of animal production facilities, 2012 proved to be an important year in the evolution of food law. Consumer interest in food, from the production processes at the farm level, to the various claims made at retail venues, may be at an all-time high despite, fortunately, the absence of a major outbreak of a food borne illness. This may signal a movement away from crisis-based consumer attention in food to a more systematic and steady focus on broader issues related to the food supply chain. Private litigation, in the form of various consumer protection claims, gained considerable traction, especially in the context of “natural” claims. On the other hand, industrial interests pushed back on this wider consumer scrutiny of the supply chain with the introduction of various Ag Gag bills, a successful court challenge to the downer animal prohibition in California, an important food libel suit associated with the disclosure of pink slime in ground beef, and the defeat of mandatory labeling measures for food produced with genetic engineering. In sum, these tensions among the various market forces are likely to continue, along with greater government involvement in the next years as the nation moves beyond the 2012 election season.

---

240. *Vote Ends EU-U.S. Hormone-Treated Beef Row*, REUTERS, <http://www.reuters.com/article/2012/03/14/eu-trade-beef-idUSL5E8EE50620120314> (last visited Mar. 27, 2013).

241. *Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso*, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, February 13, 2013, available at <http://www.ustr.gov/about-us/press-office/press-releases/2013/february/statement-US-EU-Presidents> (last visited Feb. 27, 2013).

LOCALLY GROWN FOOD:  
EXAMINING THE AMBIGUITY OF THE TERM 'LOCAL' IN  
FOOD MARKETING

*Brad Rose\**

I. INTRODUCTION.....	135
II. BRIEF HISTORY OF LOCAL FOOD MARKETING.....	137
III. ANALYSIS OF LOCAL FOOD DEFINITIONS.....	140
A. <i>Consumer Expectations</i> .....	140
B. <i>Current Approaches</i> .....	142
C. <i>Recommendations</i> .....	145
IV. CONCLUSION.....	147

I. INTRODUCTION

Locally grown food products are becoming increasingly popular among consumers.<sup>1</sup> In response, many food retailers are devoting more space to locally grown products.<sup>2</sup> The locally grown label is part of a marketing strategy designed to take advantage of consumer desires for fresh and safe products that support local farmers and help the environment.<sup>3</sup> Many consumers believe that locally grown food is “fresher, has fewer chemicals, and comes from smaller, less corporate farms.”<sup>4</sup> This increased demand from consumers has led to an “explosion of the use of the word ‘local’ in food marketing.”<sup>5</sup> However, there is no single definition of “local” or “local food systems” in terms of the

---

\*J.D. Candidate, Spring 2013, University of Arkansas School of Law. The author thanks Professor Dustin Buehler for his passionate assistance, guidance, and support.

1. Julie Schmit, “*Locally grown*” food sounds great, but what does it mean?, USA TODAY, \*Oct 31, 2008), [http://usatoday30.usatoday.com/money/economy/2008-10-27-local-grown-farms-produce\\_N.htm](http://usatoday30.usatoday.com/money/economy/2008-10-27-local-grown-farms-produce_N.htm) (noting that “at least one consumer survey has showed that whether something is locally grown is now more important than whether it is organic”).

2. *Id.*

3. *Id.*

4. Marie Clare Jalonick, *Miles of confusion over what “locally grown” means*, THE SEATTLE TIMES, (Apr. 14, 2011), [http://seattletimes.com/html/BusinessTechnology/2014778414\\_localfood15.html](http://seattletimes.com/html/BusinessTechnology/2014778414_localfood15.html).

5. *Id.*

geographic distance between production and sales.<sup>6</sup> Therefore, retailers may, and often do have much broader definitions of “local” than consumers do.<sup>7</sup> Currently, definitions related to geographic distance between production and sales vary by regions, companies, consumers, and local food markets.<sup>8</sup> For example, Wal-Mart, the nation’s biggest retailer, considers anything “local” if it is grown in the same state as it is sold, regardless of the size of the state.<sup>9</sup> Whole Foods, the largest retailer of natural and organic foods, considers “local” to be anything produced within a seven-hour drive of a store.<sup>10</sup> Supervalu, which operates supermarket chains such as Albertsons and Jewel-Osco, “defines ‘local’ as within regions that can encompass four or five states.”<sup>11</sup> Safeway considers anything to be “local” if it comes from the same state or within a one-day drive from the field to the store, and many retailers simply leave it up to individual store managers.<sup>12</sup> In some cases, unchecked retailers simply slap a “local” label on food from several states away, or even from other countries.<sup>13</sup> For example, under “the words ‘Home Grown,’ [a] Wegmans in Hunt Valley offered eggplants grown so far away - the Netherlands - that their stickers were in French.”<sup>14</sup> This lack of uniformity causes confusion among consumers, and gives retailers wide latitude when labeling food “locally grown.”

The increased interest in local food “suggests that the term ‘local’ is being used in new and different ways, and by people and organizations that would have previously had no interest in movements that challenge the mainstream food system.”<sup>15</sup> Local food has been the topic of many newspaper and magazine articles, best-selling books, and has been codified

---

6. See *id.*; Schmit, *supra* note 1; see also Steve Martinez et al., *Local Food Systems: Concepts, Impacts, and Issues*, U.S. Dept. of Agriculture, Economic Research Service, ERR 97, at 3 (May 2010).

7. Schmit, *supra* note 1.

8. Martinez et al., *supra* note 6.

9. Schmit, *supra* note 1.

10. *Id.*

11. Jalonick, *supra* note 4.

12. *Id.*

13. See Laura Vozzella, *Local Produce Finds Favor, But It Isn't Always Local*, THE BALTIMORE SUN, (July 9, 2009), [http://articles.baltimoresun.com/2009-07-09/news/0907080122\\_1\\_local-produce-local-farms-produce-case](http://articles.baltimoresun.com/2009-07-09/news/0907080122_1_local-produce-local-farms-produce-case).

14. *Id.* The stickers bore the word “Aubergine” (French for eggplant). “Also in that produce case [were] white asparagus from Peru [and] bell peppers from Canada.” *Id.* In addition, *The Baltimore Sun* reported that “signs atop the produce case in Baltimore-area Safeway stores promoted ‘local’ apples from Virginia and New Jersey, but the Granny Smiths and galas in the case hailed from Chile and New Zealand.” *Id.*

15. Michael S. Hand & Stephen Martinez, *Just What Does Local Mean?*, CHOICES: THE MAGAZINE OF FOOD, FARM, AND RESOURCE ISSUES, (1st Quarter 2010).

into federal law and regulations.<sup>16</sup> Yet, because of the diverse interests of those using the term, local has taken on many different meanings to different people, especially among retailers and consumers.<sup>17</sup> Some states have passed laws to remove the term's ambiguity, and in 2008, Congress attempted to establish a more uniform definition of "locally" and "regionally" grown.<sup>18</sup> However, because of the breadth of Congress's definition, the term remains ambiguous and does little to ensure that consumers are getting what they expect when purchasing locally grown food.<sup>19</sup> The current definition, or lack of definition, undermines many of the reasons that locally grown products have recently become popular among consumers.

This comment will attempt to identify what consumers actually expect when purchasing locally grown products, and whether a more uniform definition can be created that will meet those expectations. Part II will examine the history of the local food movement and local food labeling. Part III will identify consumer expectations of the local food label, examine some of the current approaches to remove the term's ambiguity and attempt to identify a practical solution to the problem. Ultimately, this article concludes that a single, uniform definition is likely too difficult to implement and would not best serve the interests of consumers. In the author's opinion, the most practical solution is to require retailers to label locally grown products with "food miles," which is the distance food travels from the farm to the store where it is purchased.<sup>20</sup>

## II. BRIEF HISTORY OF LOCAL FOOD MARKETING

In the early 1900's, most of the food bought and sold in the United States was grown locally.<sup>21</sup> "[F]ew foods were processed or packaged, and fruits and vegetables, fish, and dairy products typically traveled less than a day to market."<sup>22</sup> Following World War II, lower transportation costs and

16. *Id.*; Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 6015, 122 Stat. 1167 (2008).

17. Hand & Martinez, *supra* note 15.

18. Food, Conservation, and Energy Act § 6015. However, Congress's definition was created specifically for eligibility for certain government assistance programs. See *infra* notes 54-61 and accompanying text.

19. See Hand & Martinez, *supra* note 15.

20. Sally Deneen, *Food Miles*, THE DAILY GREEN, <http://www.thedailygreen.com/living-green/definitions/Food-Miles> (last visited Jan. 31, 2013).

21. Martinez et al., *supra* note 6, at 1 (citing Richard Pirog, *Local Foods: Farm Fresh and Environmentally Friendly*, [http://www.leopold.iastate.edu/research/marketing\\_files/WorldBook.pdf](http://www.leopold.iastate.edu/research/marketing_files/WorldBook.pdf) (accessed June 2009)).

22. *Id.* (citing Danielle Giovannucci et al., *Defining and Marketing 'Local' Foods: Geographical Indications for U.S. Products*, 13 JOURNAL OF WORLD INTELLECTUAL

improvements in refrigerated trucking led to a shift from local to national and global food sources.<sup>23</sup> Throughout the 20<sup>th</sup> century, “regional and global specialization reinforced transition to nonlocal food systems.”<sup>24</sup> However, recently the mainstream food system has been challenged by growth of locally grown foods.<sup>25</sup> The heightened interest in local foods in the U.S. is tied to several food movements.<sup>26</sup> The local and organic food movements are considered to be part of the broader sustainability movement.<sup>27</sup> In recent years, concerns about the environment and the contrast between obesity in the Western world and the food insecurity of developing countries have fueled movements toward sustainable eating as a form of ethical food consumption.<sup>28</sup>

While local food is not a particularly new concept in the U.S. food system, the popularity of locally grown foods has risen dramatically over the past ten to fifteen years.<sup>29</sup> For example, “Direct-to-Consumer marketing amounted to \$1.2 billion in current dollar sales in 2007, according to the 2007 Census of Agriculture, compared with \$551 million in 1997.”<sup>30</sup> In addition, the number of farmers’ markets, community-supported agriculture organizations, and farm-to-school programs has dramatically increased over the same period.<sup>31</sup> According to a U.S. Department of Agriculture report, total sales of “local foods” amounted to \$4.8 billion in 2008, and the department predicted that sales would generate \$7 billion in 2011.<sup>32</sup> The movement has certainly not gone unnoticed by food retailers. For instance, Whole Foods has devoted “almost 22% of its

---

PROPERTY (Special Issue: The Law and Economics of Geographical Indications) (Mar. 2010)).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 2 (citing Amy Guptill & Jennifer L. Wilkins, *Buying into the Food System: Trends in Food Retailing in the U.S. and Implications for Local Foods*, 19 AGRICULTURE AND HUMAN VALUES 39-51 (2002)).

27. Local & Regional Food Systems, GRACELINKS, <http://www.gracelinks.org/254/local-regional-food-systems> (last visited Feb. 2, 2013).

28. PETER SINGER & JIM MASON, *THE WAY WE EAT: WHY OUR FOOD CHOICES MATTER* 3-5 (2006) (noting that “[i]ncreasingly, people are regarding their food choices as a form of political action”).

29. Hand & Martinez, *supra* note 15; Martinez et al., *supra* note 6, at iii.

30. Martinez et al., *supra* note 6, at iii. While this constitutes a small percentage of total agricultural sales, it illustrates the growth of local food markets. *Id.*

31. *Id.* at iii-iv.

32. Jim Suhr, ‘Locally Grown’ Food a \$4.8 Billion Business, Says USDA Report, HUFFPOST (Nov. 14, 2011, 8:04 AM), [http://www.huffingtonpost.com/2011/11/14/locally-grown-food\\_n\\_1092146.html](http://www.huffingtonpost.com/2011/11/14/locally-grown-food_n_1092146.html). The \$4.8 billion figure was several times greater than earlier estimates. *Id.*

produce budget [to] locally grown products, up from 15% four years ago.”<sup>33</sup> In 2010, Wal-Mart, the world’s largest grocer, announced a program to double the percentage of locally grown produce it sells to 9%.<sup>34</sup> However, as retailers respond to increased demand for locally grown food, the absence of a uniform definition allows retailers to take advantage of the movement by stretching the breadth of the definition beyond most consumers’ expectations.

Some difficulties arise when attempting to create a uniform definition of local. Because of the diverse group of interested parties, natural differences among types of products and differences among regions, local can have various meanings.<sup>35</sup> Although researchers have identified and used several definitions for local when assessing local food systems, these definitions have been problematic.<sup>36</sup> A typical example of local food is food that has been grown within a 100-mile radius of where it is consumed.<sup>37</sup> However, this distance “is arbitrarily selected, and may not match well with consumer preferences and attitudes about local food.”<sup>38</sup>

The difficulty in creating a uniform definition of local is illustrated by the definition adopted by Congress in the Food, Conservation, and Energy Act of 2008.<sup>39</sup> For certain federal loan programs, a “locally produced agricultural food product” is defined as:

any agricultural food product that is raised, produced, and distributed in (1) the locality or region in which the final product is marketed, so that the total distance the product is transported is less than 400 miles from the origin of the product, or (2) the State in which the product is produced.<sup>40</sup>

33. Schmit, *supra* note 1.

34. Stephanie Clifford, *Wal-Mart to Buy More Local Produce*, N.Y. TIMES (Oct. 14, 2010), [http://www.nytimes.com/2010/10/15/business/15walmart.html?\\_r=0](http://www.nytimes.com/2010/10/15/business/15walmart.html?_r=0).

35. Hand & Martinez, *supra* note 15.

36. Jonnie B. Dunne et al., *What does “local” mean in the grocery store? Multiplicity in food retailers’ perspectives on sourcing and marketing local foods*, 26 RENEWABLE AGRICULTURE AND FOOD SYSTEMS 46-59 (2011).

37. Hand & Martinez, *supra* note 15.

38. *Id.* Some consumers may find the 100-mile radius too large, while others may be more concerned with the state of origin. *Id.* For example, although many consumers in Little Rock, AR, would likely consider food from neighboring Fayetteville, AR, to be “local” (approximately three hours away), the distance exceeds the 100-mile limit.

39. *Id.*; Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 6015, 122 Stat. 1167, (2008).

40. Hand & Martinez, *supra* note 15; Food, Conservation, and Energy Act § 6015.

While the breadth of the definition may increase access to federal subsidies, it does little to protect the consumer when purchasing locally grown foods. With the exception of a few state laws, Congress's definition of local is the only restriction on the use of the term.<sup>41</sup> As it stands now, in most cases, retailers are free to advertise food as locally grown according to their own definition of the term.<sup>42</sup>

### III. ANALYSIS OF LOCAL FOOD DEFINITIONS

#### A. *Consumer Expectations*

In order to remove the ambiguity of the term "locally grown" and prevent retailers from misleading consumers, the meaning of that term must match consumer expectations. Thus, before attempting to nail down a specific definition for locally grown products, it is essential to understand consumer expectations and motivations for purchasing these products.

Many studies explore consumer motivations for purchasing locally produced food.<sup>43</sup> Recent data suggests that "while local food consumers are demographically diverse, they are very similar in their motivations for buying local."<sup>44</sup> In a 2009 survey conducted by the Food Marketing Institute, respondents "cited freshness (82 percent), support for the local economy (75 percent), and knowing the source of the product (58 percent) as reasons for buying local food."<sup>45</sup> Additionally, many consumers associate local food with small, local farms and environmental sustainability.<sup>46</sup> Studies have also indicated that local food buyers believe local produce to be "fresher looking and tasting, of higher quality, and a better value for the price."<sup>47</sup> As a result of these preferences, local food

---

41. See Martinez et al., *supra* note 6, at iii.

42. See *id.*

43. Martinez et al., *supra* note 6, at 29-33.

44. *Id.* at 29.

45. *Id.* (summarizing findings of *U.S. Grocery Shopper Trends 2009*, FOOD MARKETING INSTITUTE, at 67 (2009)).

46. Kim Darby et al., *Decomposing Local: A Conjoint Analysis of Locally Produced Foods*, 90 AM. J. AGRIC. ECON. 476-86 (2008). Some have questioned whether buying local actually contributes to these desired effects. See, e.g., SINGER & MASON, *supra* note 28, at 139-47. However, these criticisms are beyond the scope of this article as it merely attempts to carve out a definition of local that matches consumer expectations.

47. Martinez et al., *supra* note 6, at 29-30. For specific findings, see Alan S. Kezis et al., *Consumer Acceptance and Preference for Direct Marketing in the Northeast*, 15 J. FOOD DISTRIBUTION RES. 38-46 (1984); Marianne McGarry Wolf, *A Target Consumer Profile and Positioning for Promotion of the Direct Marketing of Fresh Produce: A Case Study*, 28 J. FOOD DISTRIBUTION RES. 11-17 (1997); Marianne McGarry Wolf et al., *A Profile of Farmers' Market Consumers and the Perceived*

buyers are often willing to pay higher prices for products that carry the locally grown label.<sup>48</sup> Several studies have measured the magnitude of willingness to pay for locally grown foods.<sup>49</sup> In some cases, consumers are willing to pay as much as fifty percent more for products labeled locally grown.<sup>50</sup> This higher willingness to pay creates further incentive for retailers to define the term more broadly.

In light of the motivations behind local food purchases, the current definitions of locally grown fail to adequately serve consumer goals. Although a measure of freshness is relative, and products that originate in the same region or a few hundred miles away may be fresher than others, most consumers concerned with freshness expect the products to come from much closer.<sup>51</sup> In addition, the interests of a buyer motivated by local economic concerns are probably not served by a definition that can include products from several states away. Furthermore, environmentally concerned buyers are best served by a more narrow definition. In many cases, under the current definition, locally grown products could be trucked hundreds of miles, across several states. Transporting these foods can actually lead to greater carbon emissions than traditional supply chains.<sup>52</sup> A more narrow definition could contribute to remedying this misconception as well.<sup>53</sup> Finally, in most surveys, when asked what they consider locally grown, consumers have consistently identified an area much smaller than currently employed, and many expect local to mean something smaller than statewide.<sup>54</sup> Upon assessing both the motivations driving the local food movement and consumers' stated expectations, the current definition of locally grown is inadequate.

---

*Advantages of Produce Sold at Farmers' Markets*, 36 J. FOOD DISTRIBUTION RES. 192-201 (2005).

48. Martinez et al., *supra* note 6, at 29.

49. *Id.*

50. *Id.* at 31. These studies measured the willingness to pay for various locally grown foods including potatoes, strawberries, greens, applesauce and other produce and specialty products. Consumers were most willing to pay more for locally grown Florida fresh produce (50% higher). *Id.*

51. *See id.* at 29-33.

52. *See* Hand & Martinez, *supra* note 15.

53. However, because products are often routed through distribution centers, a more narrow definition would not necessarily alleviate this problem. *See* SINGER & MASON, *supra* note 28, at 135 (noting that "[distribution] systems are designed to ensure reliability of supply rather than to minimize the distance food travels").

54. Martinez et al., *supra* note 6, at 3.



### B. Current Approaches

As previously mentioned, some efforts have been made to establish a single, uniform definition of locally grown, such as Congress's definition in the 2008 Farm Bill.<sup>55</sup> Considering some of the more hotly debated topics within the 2008 Farm Bill, the definition of local was likely a smaller issue. Furthermore, Congress's definition was specifically created for the Value-Added Producer Grant (VAPG) program run by USDA Rural Development.<sup>56</sup> The VAPG program provides competitive grants to individual agricultural producers and specific types of organizations associated with agricultural producers.<sup>57</sup> Among the program's goals is to "strengthen[] the profitability and competitiveness of small and medium sized family farms and ranches."<sup>58</sup> The program was expanded in 2008 to allow eligibility for locally produced and marketed food products.<sup>59</sup>

In the 2008 Farm Bill, Congress's main concern when adopting a definition of local was to support the local food system by incentivizing local producers and retailers to engage in local food markets.<sup>60</sup> It was not specifically addressing the problems stemming from a lack of a definition of local in the market.<sup>61</sup> A more broad definition, for purposes of the VAPG program, creates more opportunities for producers to receive grants and likely lends support to the local food movement.<sup>62</sup> Therefore, this particular definition of local may be appropriate for its intended purpose. However, retailers may use this definition as a guideline when marketing products, even though this definition does not remotely resemble most

---

55. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 6015, 122 Stat. 1167 (2008).

56. Value-Added Producer Grants, SUSTAINABLE AGRICULTURE, <http://sustainableagriculture.net/publications/grassrootsguide/local-food-systems-rural-development/value-added-producer-grants/> (last visited Feb. 2, 2013).

57. *Id.*

58. *Id.*

59. *Id.* "The definition of a value-added agricultural product now includes . . . an agricultural commodity or product that is aggregated and marketed as a locally-produced agricultural food product. Farmers can now be funded under the program for the development of mid-tier value chains, which the farm bill defines as local and regional supply networks that link independent producers with businesses and cooperatives that market value-added agricultural products . . ." *Id.*

60. *See generally id.*

61. *See id.*

62. *See id.* Funding for the program is actually relatively small in relation to other farm programs. The funding level for 2010 and 2011 combined was \$40.2 million. *Id.* Of that, only 10% is reserved for mid-tier value chain projects. *Id.* Nonetheless, many producers have benefitted from grants for engaging in value-added agricultural practices, including local food production systems. *Id.*

consumers' expectations when purchasing locally grown food. Congress's definition of local may be appropriate for agricultural grant programs, but it is too broad to protect local food buyers.

Many other difficulties arise when attempting to create a uniform definition of local at the federal level. The diversity of crops involved and the differences among growing regions make it almost impossible to identify a single definition that would work across the board.<sup>63</sup> The acceptable distance for one food product to be considered locally grown may not be the same for another.<sup>64</sup> For instance, consumers may accept longer distances for products such as baking goods, coffee, and bread than for fresh produce or dairy products. In addition, a distance that works for a crop in one state may not work in others.<sup>65</sup> For example, Florida consumers may not consider citrus grown from several counties away to be local, even though it is grown within the state. In contrast, a consumer in Georgia or Alabama may consider the same produce to be local, though it is grown farther away, and out of state. Opinions of an appropriate distance can also be affected by population density.<sup>66</sup> Consumers in heavily populated areas may be able to source products within a shorter distance, and thus may have a different definition than those in more rural areas.<sup>67</sup> For these reasons, a workable definition of locally grown is unlikely to come at the federal level.

The lack of a sufficient federal definition has led some states to address the problem.<sup>68</sup> For example, many states have passed legislation to make it easier for local farmers to advertise that their food was produced in-state.<sup>69</sup> Maryland requires retailers to indicate which state the food is from when advertising it as locally grown.<sup>70</sup> Massachusetts has certain

---

63. Jalonick, *supra* note 4.

64. *Id.*

65. *Id.*

66. Martinez et al., *supra* note 6, at 3.

67. *Id.* "This is referred to as 'flexible localism,' with the definition of local changing depending on the ability to source supplies within a short distance or further away . . . ." *Id.* (citing Brian Ilbery & Damian Maye, *Retailing Local Food in the Scottish-English Borders: A Supply Chain Perspective*, 37 GEOFORUM 352-67 (2006)). For example, a survey in Washington indicated that 66% of producers in the densely populated King County considered their local market to be "their own or surrounding counties," while only 20% of producers in the more rural Grant County considered their local market to be that small. *Id.* (citing Theresa Selfa & Joan Qazi, *Place, Taste, or Face-to-Face? Understanding Producer-Consumer Networks in "Local" Food Systems in Washington State*, 22 AGRICULTURE & HUMAN VALUES 451-64 (2005)).

68. Jalonick, *supra* note 4.

69. *Id.*

70. Jenny Rogers, *Maryland's local-food law goes into effect*, THE MARKET REPORT (June 27, 2011). A Maryland statute gives the Secretary the authority to adopt

restrictions for the word “native,”<sup>71</sup> and Vermont has actually defined local as “grown within the state or within thirty miles of where it is sold.”<sup>72</sup> Vermont’s approach comes closest to matching the definition with the expectations of the consumer. A thirty mile radius or a statewide area, especially in a smaller state such as Vermont, is much more closely aligned with expectations gathered from consumer surveys. In addition, Vermont’s narrower definition likely respects most of the motivations behind local food purchases. Many of the goals of the local food movement such as freshness, support for local farms, and environmental sustainability are protected by Vermont’s definition. However, Vermont’s approach also has shortcomings, and may not work in many other states for the following reasons.

First, a definition that includes “anything grown within the state” may fall short of consumer expectations in larger states such as California or Texas. Second, because the definition of locally grown is used for many different purposes, a single definition may not be appropriate even within one state.<sup>73</sup> Finally, as USDA economic researchers, Steve Martinez and Michael Hand have argued, the “desired outcomes [of local food systems] are numerous, and no single definition can adequately capture the diverse demands that are reflected by support for local foods.”<sup>74</sup> A definition of local that includes a certain distance may be aimed at environmental sustainability through reduced transportation costs.<sup>75</sup> A different definition may be aimed at direct sales to consumers to reduce prices by eliminating supply chain middlemen.<sup>76</sup> Yet another could be aimed at produce

---

standards to regulate the use of the terms “locally grown” and “local” to advertise or identify an agricultural product. MD. CODE ANN. § 10-1701 (effective July 2011).

71. Jalonick, *supra* note 4. According to the Massachusetts law, “[n]o person shall sell or offer to sell . . . vegetables or turkeys in containers bearing the label or designation ‘native’ nor cause fruit, vegetables or turkeys to be advertised as ‘native’ unless the name of the state . . . appears immediately after the word ‘native . . .’ MASS. GEN. LAWS ANN. ch. 94, § 99B (2006).

72. Jalonick, *supra* note 4. According to the Vermont law, “‘local,’ ‘locally grown,’ and any substantially similar term shall mean that the goods being advertised originated within Vermont or 30 miles of the place where they are sold, measured directly, point to point, except that the term ‘local’ may be used in conjunction with a specific geographic location, such as ‘local to New England,’ or a specific mile radius, such as ‘local-within 100 miles,’ as long as the specific geographic location or mile radius appears as prominently as the term ‘local,’ and the representation of origin is accurate.” VT. STAT. ANN. tit. 9, § 2465a (2008).

73. See Martinez et al., *supra* note 6, at 3. For example, one definition may be needed for eligibility for federal grants or state funds, and another for retail marketing.

74. Hand and Martinez, *supra* note 15.

75. *Id.*

76. *Id.*

freshness or support for local farmers.<sup>77</sup> It may be that the various desires and motivations driving the local food movement are not served by a single definition of locally grown.

### C. Recommendations

Although consumers may desire a uniform definition of locally grown, any advantages of a uniform approach are likely outweighed by the shortcomings and difficulties that accompany a single, nationwide definition. Consumers could push for regulation at the state level similar to that of Vermont. More localized regulation at the state level is somewhat more practical, and would provide a certain amount of protection for consumers. However, even if each state adopted a uniquely tailored definition of locally grown, the definition would likely not match the expectations of many local food buyers. Therefore, given the problems inherent in creating a single definition of local, regulation can best serve the local food movement simply by requiring sellers to provide consumers with more information.

Rather than focusing on a single definition of local, information could be provided that allows each individual consumer to apply their own definition of local. One of the more popular methods that researchers have suggested is the use of “food miles.”<sup>78</sup> Food miles represent the number of miles that the product has traveled from producer to market.<sup>79</sup> Environmental groups, especially in Europe, have been advocating for food miles labels for all food.<sup>80</sup> The biggest criticism of food miles has been that food that travels a shorter distance is not necessarily better for the environment.<sup>81</sup> Because many local foods are transported via truck in lesser bulk, carbon emissions can actually be greater for many locally grown products than for products transported from much farther away.<sup>82</sup> However, this criticism is, at least in part, due to the inefficiencies in new local food supply systems.<sup>83</sup> Another criticism of food miles is that transportation represents only one “energy-consuming aspect of production.”<sup>84</sup> While it may be unclear whether lower food miles

---

77. *Id.*

78. Dunne, *supra* note 36; Deneen, *supra* note 20.

79. Deneen, *supra* note 20.

80. James McWilliams, *Food That Travels Well*, N.Y. TIMES (Aug. 6, 2007), [http://www.nytimes.com/2007/08/06/opinion/06mcwilliams.html?\\_r=0](http://www.nytimes.com/2007/08/06/opinion/06mcwilliams.html?_r=0).

81. *Id.*

82. Martinez et al., *supra* note 6, at 48.

83. *Id.* at 48-49.

84. McWilliams, *supra* note 80. Consequently, researchers at a New Zealand University found that lamb raised in New Zealand and shipped 11,000 miles to Britain

necessarily translate into decreased carbon emissions, most researchers would agree that a general move towards local food supply systems will benefit the environment.

Even if the environmental criticisms of food miles are accepted, reduced carbon emissions are only one of many factors motivating local food buyers. As previously mentioned, other motivations include freshness, support for local farms, and knowledge of the source of the product.<sup>85</sup> A label carrying food miles would provide consumers with information pertaining to all of these factors. If the goal is to protect consumers and prevent retailers from taking unfair advantage of the local food movement, a consumer's access to accurate information is key. In addition, the consumer could choose a product that fits his or her specific motivations for purchasing local food. Under this approach, retailers and consumers would not have to agree on a single definition of local. Consumers could even disagree among each other, as each would be free to individually define the term.

Though food miles labeling may represent an alternative to a single definition of locally grown, the requirement will likely meet resistance from retailers. Potential problems include the lack of adequate distribution centers and the difficulty and cost of tracking food from the farm to the store.<sup>86</sup> "Because most small farmers must combine their products with other farmers' products to make processing and shipping more economical," it can sometimes be difficult to trace food products back to their origin.<sup>87</sup> However, in recent years, new "easy-to-use recordkeeping devices and farm-level information labeling" have alleviated some of the traceability issues.<sup>88</sup> Many food retailers that specialize in organic and local foods already employ a similar system. For example, a Fayetteville, Arkansas retailer, Ozark Natural Foods, traces all of its locally grown

---

produced much less carbon dioxide emissions than lamb raised in Britain. The study concluded it was "four times more energy-efficient for Londoners to buy lamb imported from the other side of the world than to buy it from a producer in their backyard. Similar figures were found for dairy products and fruit." *Id.*

85. See *supra* notes 45-47 and accompanying text.

86. McWilliams, *supra* note 80; Martinez et al., *supra* note 6, at 48. "For example, a case study of a certified organic produce grower in southern Idaho found that when the grower sells to Albertsons, . . . the food must be shipped from the farm to a distribution center located 235 miles away in Utah. It can then be shipped back to Idaho for sales in local stores." Martinez et al., *supra* note 6, at 4 (citing Colette DePhelps et al., *Mid-Size Producer Capturing Local Value: M&M Heath Farms, NORTHWEST DIRECT MARKETING (Farmer Case Study Series #04) (2005)*).

87. Martinez et al., *supra* note 6, at 26.

88. *Id.* at 27.

products back to specific farms.<sup>89</sup> Although Ozark does not use food miles labels, it marks each local product with a distinct sign with the name of the farm that grew it.<sup>90</sup> Additional information, including the location of each farm, can be found on Ozark's website and in brochures in the store.<sup>91</sup> Ozark's system illustrates that if local food buyers desire more accurate information, food miles labeling by retailers is feasible.

An argument could be made that what works for a local food market that specializes in organic and local food may not work for other retailers. For example, many larger retailers do not have products shipped directly from the farm to the store.<sup>92</sup> Because the products may be routed through a distribution center, simply identifying their origin may mislead consumers. Additionally, local stores like Ozark and farmer's markets attract a certain type of customer who is possibly less concerned with incremental price increases that may accompany additional tracking and labeling. However, the regulation would only apply to those foods advertised as locally grown. Retailers who want a piece of the local food market should have to take steps to ensure they are actually selling what they advertise.

Because of the difficulty in defining local and the potential for abuse by retailers, the benefits of the labeling requirements likely outweigh whatever minimal cost they would entail. Even if the added regulations create minimal price increases, considering the nature of most local food buyers, demand for locally grown products would likely be affected very little. In addition, assuming the local food movement continues to grow and local supply chains improve, the prices of locally grown products should fall. Ultimately, any increased requirements on food labeling may meet some resistance, but some regulation is absolutely essential to protect local food buyers. Food miles labeling would accomplish this goal at a minimal cost to the consumer and could be implemented with relatively little difficulty.

#### IV. CONCLUSION

The local food movement poses some unique problems. Unlike other categories of food products, developing a clear definition of what is considered local is extremely difficult. Because local is not an objective term, it is almost impossible to create an objective definition, especially

---

89. Produce, OZARK NATURAL FOODS, <http://www.ozarknaturalfoods.com/departments/produce> (last visited Jan. 28, 2013).

90. *Id.* Ozark considers a product "local" if it is grown within 100 miles of the store. *Id.*

91. *Id.*

92. Schmit, *supra* note 1.

considering the diversity of food products, the competing interests involved, and the various purposes of the use of the term. Because of these difficulties, requiring retailers to simply label local food with food miles seems like a workable and practical solution. Food miles labels would protect consumers and provide them with the information necessary to purchase locally grown foods according to their own expectations. Additionally, the regulation could eventually create a more efficient system of marketing local foods. Most importantly, any system that improves the process of buying and selling local foods will likely enhance the local food movement, which benefits consumers, retailers, and the overall efficiency of the entire food system.